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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Many important government posts must be filled by persons who are nominated by the President and confirmed by the Senate. The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, provides that when such an office is vacant, its functions and duties may be performed temporarily in an acting capacity by either the first assistant to the vacant post, under Section 3345(a)(1); a Senate-confirmed official occupying another office in the Executive Branch who is designated by the President under Section 3345(a)(2); or a senior official in the same agency designated by the President under Section 3345(a)(3).

Section 3345(b) of the FVRA provides as a general rule that "[n]othwithstanding subsection (a)(1)," a person who is nominated to fill a vacant office that is subject to the FVRA may not perform the office's functions and duties in an acting capacity unless the person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(b).

The question presented is whether the precondition in 5 U.S.C. 3345(b)(1) on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis applies only to first assistants who take office under Subsection (a)(1) of 5 U.S.C. 3345, or whether it also limits acting service by officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Labor Relations Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 796 F.3d 67. The decision and order of the National Labor Relations Board (App., *infra*, 31a-74a) is reported at 360 N.L.R.B. No. 109. The decision by the administrative law judge (App., *infra*, 75a-111a) is available at 2013 WL 4041158.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2015. A petition for rehearing was denied on January 20, 2016 (App., *infra*, 112a-115a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provision of the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345, is reproduced in the appendix to this petition. App., *infra*, 116a-118a.

STATEMENT

1. a. Congress enacted the Federal Vacancies Reform Act of 1998 (FVRA or Act), 5 U.S.C. 3345 *et seq.*, as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-577, 112 Stat. 2681. The FVRA sets forth procedures for temporarily filling Executive Branch offices that can be filled on a permanent basis only by persons who are nominated by the President and confirmed by the Senate. These positions are generally known as presidentially appointed, Senate-confirmed offices, or "PAS" offices. There are more than a thousand such offices, comprising the most important positions in the Executive Branch.

The FVRA regulates who may perform the functions and duties of a vacant PAS office in an acting capacity, 5 U.S.C. 3345, and how long they may serve in that capacity, 5 U.S.C. 3346; it restricts agencies' abilities to name acting officers under other statutes, 5 U.S.C. 3347; and it constrains the effect of certain actions taken by individuals who have not been designated to act in conformity with the statute, 5 U.S.C. 3348.

The limitations on who may temporarily perform the duties of vacant PAS offices are set out at 5 U.S.C. 3345. The first paragraph of the provision—Subsection (a)(1)—establishes the general rule: When a PAS office becomes vacant, the "first assistant" to that

office "shall perform" the office's functions and duties in an acting capacity. 5 U.S.C. 3345(a)(1). The FVRA then establishes four exceptions to that general rule.

The first two exceptions are in the next two paragraphs of Subsection (a) of Section 3345, which set out alternative methods the President may invoke to designate an acting officer. Paragraph (2) provides that "notwithstanding paragraph (1)," the President may direct a person who already serves in another PAS position to perform the duties of the vacant office. 5 U.S.C. 3345(a)(2). Paragraph (3) provides that "notwithstanding paragraph (1)," the President may direct a person to perform the functions and duties of a vacant office if the person has served in a senior position (defined as a position with a rate of pay equal to the minimum for a GS-15 or higher) in the agency at issue for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(a)(3).

Subsection (c) creates a third exception to the general rule that the first assistant shall perform the functions and duties of the vacant office. It provides that "[n]otwithstanding subsection (a)(1)," the President may designate an officer who has been nominated "for reappointment for an additional term to the same office" to perform the functions and duties of the office until the Senate has acted to confirm or reject the nomination. 5 U.S.C. 3345(c).

Subsection (b)(1)—the provision at issue below—creates the final exception to the general rule that the first assistant shall perform the functions and duties of the vacant office. Using language that parallels the exceptions in Subsections (a)(2), (a)(3), and (c), it states that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office

under this section" if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he "did not serve in the position of first assistant" or "served in the position of first assistant" for less than 90 days. 5 U.S.C. 3345(b)(1). Subsection (b)(2) then provides that this restriction does not apply if "such person is serving as the first assistant to the office of an officer described under subsection (a)" and that first-assistant position is itself a PAS office to which the acting officer had been confirmed. 5 U.S.C. 3345(b)(2).

The FVRA provides that certain actions taken by officials who do not serve in conformity with the FVRA "shall have no force or effect" and "may not be ratified." 5 U.S.C. 3348(d)(1) and (2).

b. Five months after the FVRA's enactment, the Office of Legal Counsel (OLC) in the Department of Justice (DOJ) issued guidance concerning the statute's construction. Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999). OLC construed the limitation in Subsection (b)(1) on a nominee serving as the acting officer "[n]otwithstanding subsection (a)(1)" as a limitation that "applies only to persons who serve as acting officers by virtue of having been the first assistant to the office"—*i.e.* only to persons who automatically assume acting status based on the general rule in Subsection (a)(1) that is directly mentioned in Subsection (b)(1). *Id.* at 64. Thus, OLC concluded, the restriction in Subsection (b)(1) does not apply to Senate-confirmed officers who have been directed by the President to serve in an acting capacity under Subsection (a)(2), and to senior agency officials who have been directed by the President to serve in an acting

capacity under Subsection (a)(3). *Ibid.* The General Accounting Office, an instrumentality of Congress, has also construed the requirements of Subsection (b)(1) as applicable only to first assistants who automatically assume acting status under Subsection (a)(1). See Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 3-4 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf (Joyner).

In accordance with that construction, every President since the FVRA's enactment has made nominations premised on the understanding that the limitation in Subsection (b)(1) generally requiring 90 days of service as a first assistant during the past year does not apply to persons who become acting officers under Subsection (a)(2) or (a)(3). Nominees serving in an acting capacity on the basis of the Executive Branch's longstanding interpretation have been routinely confirmed by the Senate. For instance, within a year of the FVRA's enactment, President Clinton nominated David Ogden, who had previously served in a senior position in the Department of Justice and was serving as Acting Assistant Attorney General pursuant to Subsection (a)(3), to fill the Assistant Attorney General post on a permanent basis. Ogden continued serving while his nomination was pending, consistent with OLC guidance, because he had not ascended to the acting post from a first-assistant position pursuant to Subsection (a)(1). After approximately 18 months of service in an acting capacity while his nomination was pending, Ogden was confirmed by the Senate in

December 2000. President Clinton also nominated and the Senate confirmed a number of other persons who served as both nominees and acting officials pursuant to Subsections (a)(2) and (a)(3), including high-level officials at multiple government departments.

President George W. Bush relied on the same interpretation in making nominations of acting officers to fill high-level posts across multiple departments—including nominations that the Senate ultimately confirmed. For example, acting officials in the Bush Administration who continued to serve pursuant to Subsections (a)(2) or (a)(3) following nomination, and were then confirmed by the Senate, include, within the Department of Justice alone: James B. Comey for Deputy Attorney General; Paul J. McNulty, who later held the same post; R. Hewitt Pate, Assistant Attorney General for the Antitrust Division; Christopher Wray, Assistant Attorney General for the Criminal Division; Michele M. Leonhart, Deputy Administrator of the Drug Enforcement Administration; and John F. Clark, Director of the Marshals Service.

That practice has continued to the present day. A number of high-level appointees in the present Administration were both nominated and confirmed to offices the functions and duties of which they performed temporarily pursuant to Subsection (a)(2) or (a)(3). And at the present time, approximately half a dozen senior positions are filled by acting officers who serve pursuant to Subsection (a)(2) or (a)(3), and who have also been nominated to fill those offices on a permanent basis. These include high-level officials who serve in the Department of Treasury; Department of Health and Human Services (HHS); Environmental Protection Agency (EPA); Department of

Transportation (DOT); and Office of Personnel Management (OPM).

2. a. The National Labor Relations Board (NLRB or Board) is an independent agency charged with the administration of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* Its General Counsel is appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(d). The General Counsel has "final authority * * * in respect of" the issuance of complaints alleging that an individual has committed an unfair labor practice. *Ibid.*; see 29 U.S.C. 160(b).

In June 2010, after the NLRB's General Counsel resigned, the President directed senior NLRB official Lafe Solomon to serve as the Board's Acting General Counsel. App., *infra*, 5a. Solomon satisfied the requirements for acting service under 5 U.S.C. 3345(a)(3) because he had spent the previous ten years as the Director of the NLRB's Office of Representation Appeals. App., *infra*, 11a.

In January 2011, the President nominated Solomon to serve as NLRB General Counsel on a permanent basis. App., *infra*, 11a. Solomon's nomination was not acted upon during the 112th Congress, so it was returned to the President at the expiration of that Congress in accordance with Senate rules. 159 Cong. Rec. S16-S17 (daily ed. Jan. 3, 2013). The President resubmitted Solomon's nomination in May 2013, but later withdrew that nomination and put forward a different nominee (who was later confirmed). App., *infra*, 6a.

b. In January 2013, while Solomon was performing the duties of the NLRB General Counsel on an acting basis, the Regional Director, acting on behalf of the

General Counsel, issued a complaint alleging an unfair labor practice by respondent, a provider of ambulance services. The complaint alleged that respondent had unilaterally discontinued longevity payments to its emergency medical technicians, nurses, and paramedics, in violation of Subsections 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5). App., *infra*, 7a. An administrative law judge (ALJ) determined that respondent had committed an unfair labor practice, and the NLRB agreed upon review, adopting the recommended order of the ALJ with minor modifications. *Ibid.*

c. Respondent filed a petition for review in the United States Court of Appeals for the D.C. Circuit, and the NLRB filed a cross-petition for enforcement of its order. App., *infra*, 7a; see 29 U.S.C. 160(e) and (f). Respondent argued that the complaint charging an unfair labor practice had been unauthorized, because Solomon could not legally perform the duties of General Counsel after he was nominated to fill that position permanently. App., *infra*, 7a, 11a. In respondent's view, the portion of 5 U.S.C. 3345(b)(1) preventing a nominee from serving as an acting officer unless he had served as first assistant to that office for at least 90 days in the year preceding the vacancy applied not only to first assistants temporarily serving pursuant to Subsection (a)(1), but also to individuals serving under Subsection (a)(2) or (a)(3) of Section 3345. App., *infra*. 11a.

The court of appeals granted respondent's petition for review and vacated the Board's order. App., *infra*, 1a-30a. Rejecting the longstanding interpretation of the Executive Branch, the court concluded that the precondition in Subsection (b)(1) for a nominee to

serve in an acting capacity applied not only to first assistants serving under Subsection (a)(1), but also to presidentially appointed, Senate-confirmed officials directed by the President to perform the functions and duties of another position on an acting basis under Subsection (a)(2), and to senior agency officials directed by the President to do so under Subsection (a)(3). *Id.* at 20a.

The court of appeals concluded that "the text of the FVRA plainly support[ed]" this view. App., *infra*, 17a. It found the "clearest indication" of the subsection's scope to be the subsection's reference to "a person" serving as an acting officer "under this section." *Id.* at 12a (emphasis and citation omitted). That language, the court surmised, indicated that Subsection (b)(1) reached "the full spectrum of possible candidates for acting officer" under Section 3345 in its entirety. *Ibid.*

The court of appeals did not draw any contrary indication from Subsection (b)(1)'s directive that it applied "[n]otwithstanding subsection (a)(1)"—the subsection exclusively directed to automatic assumption of acting capacity by first assistants. App., *infra*, 13a; see *id.* at 13a-15a. The court reasoned that Congress had included that language to make clear that the limits in Subsection (b)(1) override the rule for first-assistant service set forth in Subsection (a)(1). But it concluded that "apart from setting out an order of operations, the 'notwithstanding' clause has no significance for the ultimate scope of subsection (b)(1)." *Id.* at 14a. The court also believed that the government's interpretation of Subsection (b)(1) as limited to first assistants serving pursuant to Subsection (a)(1) rendered superfluous language in Subsection (b)(2)(A)

permitting an acting officer to become a nominee if he "is serving as first assistant" at the time of the nomination and other preconditions are met. *Id.* at 16a.

The court of appeals identified nothing in the statute's legislative history or purpose that countermanded its reading of the text. The court saw little clarity in the FVRA's legislative history, App., *infra*, 17a-20a, and it did not see its interpretation as in tension with the purposes of Subsections (a)(2) and (a)(3) because individuals could still be directed to serve in an acting capacity under those subsections, but simply could not be both acting officers and nominees. The court accordingly "h[e]ld that the prohibition in subsection (b)(1) applies to all acting officers, no matter whether they serve pursuant to subsection (a)(1), (a)(2) or (a)(3)." *Id.* at 20a. Because "Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011," the court of appeals concluded that "the FVRA prohibited [Solomon] from serving as Acting General Counsel from that date forward."[1] *Ibid.* It concluded that Solomon was not properly serving as Acting General Counsel when petitioner issued an unfair labor practice complaint against respondent. It also found that neither harmless-error principles nor the de facto officer doctrine rendered the unfair labor practice complaint

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[1] The court of appeals noted that the government had not argued that even if Solomon's service as Acting General Counsel was prohibited while Solomon's nomination was pending, the unfair labor practice complaint here was validly issued because Solomon's acting service was again legitimate in the period between when his nomination was returned and when the President resubmitted the nomination. App., *infra*, 7a n.3. The court treated any such argument as waived. *Ibid.* Petitioner does not seek review of that conclusion.

valid regardless of whether Solomon's appointment violated the FVRA. *Id.* at 20a-30a.

d. The court of appeals denied rehearing en banc by a vote of 7-3, over the dissenting votes of Judges Brown, Kavanaugh, and Millett. App., *infra*, 114a-115a.

REASONS FOR GRANTING THE PETITION

The decision below repudiates an interpretation of the FVRA on which every President since the statute's enactment has relied. It misreads the Act's text and structure, and severely constrains the President's power in a manner that does not effectuate the Act's purposes. If left in place, the decision will cast a cloud over the service of past and current officers at high levels of government. And because challenges to the actions of virtually every administrative agency can be brought in the District of Columbia, the decision below, if left in place, will pose a significant impediment to the ability of any President going forward to temporarily fill important posts in the Executive Branch with the persons whom the President deems most qualified to fill them permanently. This Court's review is warranted.

A. Acting Officers Directed To Serve By The President Under Subsections (a)(2) and (a)(3) of 5 U.S.C. 3345 Who Have Not Served As First Assistants Are Not Barred From Continued Service Upon Being Nominated

The court of appeals concluded that the restriction in Subsection (b) of 5 U.S.C. 3345—which bars a presidential nominee from acting in a vacant position unless the individual served as first assistant for 90 days or more in the year preceding the vacancy or was con-

firmed by the Senate as the first assistant—applies to *all* individuals serving in an acting capacity under the Act, not just first assistants serving under Subsection (a)(1). That interpretation is contrary to the Act's text, structure, objectives, and history, as well as the unbroken practice since the FVRA's enactment.

1. The FVRA's text and structure support the Executive Branch's longstanding interpretation.

a. The limitations set forth in Subsection (b)(1) are most naturally read as constraining acting service by first assistants pursuant to Subsection (a)(1), not acting service by Senate-confirmed officers or senior agency employees designated by the President pursuant to Subsections (a)(2) and (a)(3). Subsection (a) provides three mechanisms for temporarily filling a vacant PAS office. Subsection (a)(1) sets forth the general rule that the first assistant "shall perform the functions and duties of the [vacant] office temporarily in an acting capacity," subject to certain time limits. 5 U.S.C. 3345(a)(1). Subsections (a)(2) and (a)(3) then authorize the President to create exceptions to that general rule of automatic accession by designating another official instead. Subsection (a)(2) provides that "notwithstanding paragraph (1)," the President may direct an officer who holds another PAS office to perform the functions and duties of the vacant office temporarily in an acting capacity. 5 U.S.C. 3345(a)(2). And Subsection (a)(3) provides that "notwithstanding paragraph (1)," the President may direct an individual who has served in a senior position in the same agency for more than 90 days during the year preceding the vacancy to perform the functions and duties in an acting capacity. 5 U.S.C. 3345(a)(3).

The very next provision of the FVRA, Subsection (b)(1), sets out a limitation that also applies "[n]otwithstanding subsection (a)(1)"—namely, that a person nominated to fill the vacant office may not perform the functions and duties of that office on an acting basis if he did not serve in the position of first assistant to the office for at least 90 days during the year preceding the vacancy. 5 U.S.C. 3345(b)(1). That provision is most naturally read as another exception to the general rule in Subsection (a)(1) that the first assistant "shall perform" the functions and duties of the office. 5 U.S.C. 3345(a)(1). It thereby prevents the Executive Branch from circumventing the advice-and-consent process by bringing someone in from outside the government after a vacancy occurs, placing him immediately in a first-assistant position, and having him assume the duties of the office in an acting capacity and continue to do so even after he is nominated.

That interpretation is evident from the text of Subsection (b)(1) itself, both because it expressly refers to and overrides only "subsection (a)(1)," and because the restriction it imposes—90 days of service as first assistant during the year preceding the vacancy—itself speaks only of a "first assistant" and ordinarily would be satisfied only by a person who had already been the first assistant. The "[n]otwithstanding subsection (a)(1)" proviso in Subsection (b)(1) "set[s] out an order of operations," App., *infra*, 14a, dictating that the limitation in Subsection (b)(1) takes precedence over one of the three mechanisms for acting service set forth in one particular subsection of the FVRA—the mechanism for service by first assistants set forth in Subsection (a)(1). The directive that Sub-

section (b)(1) takes precedence over one of Subsection (a)'s three mechanisms for filling vacant positions strongly indicates that the provision does *not* override the remaining two mechanisms, which permit the President (and only the President) to "direct" individuals meeting specified criteria to "perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. 3345(a)(2) and (3). In other words, the directive that Subsection (b)(1) applies "[n]otwithstanding subsection (a)(1)" establishes that Subsection (b)(1) is an exception only to Subsection (a)(1), not an exception to Subsections (a)(2) and (a)(3) as well.

Indeed, if Congress had meant to subject all three mechanisms for designating a person to serve in an acting capacity to Subsection (b)(1)'s requirement of 90 days of prior service as first assistant, it could have straightforwardly provided that the limitations apply "[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)," or "[n]otwithstanding subsection (a)," which contains all three mechanisms. What Congress would not do if it wished to limit appointments under all three statutory subsections, however, is direct that the limitations applied "[n]otwithstanding" only *one* of the three statutory subsections—"subsection (a)(1)."

Adjoining provisions confirm this construction. On each occasion elsewhere in the FVRA in which Congress directed that a provision operate "notwithstanding" Subsection (a)(1), it used that directive to create an exception only to the automatic service by first assistants under Subsection (a)(1). Thus, Congress twice used the phrase "notwithstanding paragraph (1)" in Subsection (a) itself to establish that the President's power to designate a Senate-confirmed officer

or senior agency employee overrides the rule of automatic accession by the first assistant in Subsection (a)(1)—thereby constraining operation of Subsection (a)(1) alone. 5 U.S.C. 3345(a)(2) and (3). And Congress likewise used the "[n]otwithstanding subsection (a)(1)" formulation in Subsection (c) to override only the rule of automatic accession by the first assistant in Subsection (a)(1). Specifically, Congress provided in Subsection (c) that under particular circumstances, the President may direct a person who is nominated by the President for reappointment to an additional term in the same office to continue to serve in that office until the Senate acts on the nomination. 5 U.S.C. 3345(c)(1). The government's longstanding interpretation of Subsection (b)(1) gives the same meaning and function to the directly parallel "notwithstanding" clauses referring solely to Subsection (a)(1) in each of the four relevant subsections in which that phrase appears. The court of appeals' interpretation, in contrast, gives Subsection (b)(1)'s "[n]otwithstanding" clause a fundamentally different role from elsewhere in Section 3345.

b. The court of appeals' contrary reading is mistaken. The court sought to explain why Congress directed that Subsection (b)(1) supersede Subsection (a)(1), but did not make a similar directive with respect to Subsections (a)(2) and (a)(3), on the ground that Subsection (a)(1) provides that the first assistant "'shall' take over as acting officer" under the conditions set forth in that paragraph. App., *infra*, 14a. But that is no explanation. The word "shall" in Subsection (a)(1) is what makes the general rule of accession by the first assistant mandatory and automatic. 5 U.S.C. 3345(a)(1). Subsections (a)(2) and (a)(3) do not

use the word "shall" because their operation is not automatic, but rather is conditioned on the President choosing to invoke them. Once the President does so, however, those subsections are just as categorical as Subsection (a)(1) in unconditionally directing the specified officer to perform the office's functions and duties. Accordingly, Congress's "[n]otwithstanding subsection (a)(1)" directive in Subsection (b)(1) cannot be explained as a response to the differing phraseology of Subsections (a)(1), (a)(2), and (a)(3). If Congress had wanted to override the acting-service provisions in Subsections (a)(2) and (a)(3), by imposing the rule of 90 days of prior service as first assistant on nominees who did not even assume an acting capacity on that basis, Congress surely would have needed to direct that Subsection (b)(1)'s rule applies "notwithstanding" those provisions, as well as "[n]otwithstanding subsection (a)(1)."

The court of appeals also stated that Subsection (b)(1) must constrain service under all three paragraphs in Subsection (a) because Subsection (b)(1)'s reference to limits on "person[s]" serving under "this section" is "irreconcilable" with the Executive Branch's longstanding view of Subsection (b)(1) as imposing limits solely on first assistants. App., *infra*, 14a. The court erred in suggesting a conflict between that language and the government's reading. The first assistants described in Subsection (a)(1) to whom Subsection (b)(1) applies are, of course, "person[s]" who are serving under "this section"—5 U.S.C. 3345.[2] And

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[2] The specification that Subsection (b)(1) is relevant only to acting designations under Section 3345 does serve a limiting function. The FVRA provides that Section 3345 is not the exclusive mechanism for temporarily authorizing acting service, by stating that

because Subsection (b)(1) already indicates that it limits only first assistants serving under Subsection (a)(1) by specifying that it applies "[n]otwithstanding subsection (a)(1)"—rather than "[n]otwithstanding subsection (a)" or "[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)"—there was no need for Congress to reiterate, using the court's preferred formulations, that the affected persons were only those who are first assistants serving under Subsection (a)(1).[3]

Finally, the court of appeals suggested that the Executive Branch's longstanding construction should be rejected because the Executive Branch's reading—"but not [respondent's]—renders other provisions of section 3345 superfluous." App., *infra*, 15a. The court reasoned that if Subsection (b)(1) were limited to first assistants, it would be superfluous for the exception to Subsection (b)(1) set out in Subsection (b)(2) to be made expressly applicable to a person who "is serving" as first assistant. *Id.* at 16a. But Subsection (b)(1) imposes a restriction on the basis of the brevity

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acting service is also valid if allowed under a different express statutory authorization meeting certain criteria. See 5 U.S.C. 3347(a). By specifying that the limits in Subsection (b)(1) apply only to acting service under Section 3345, Subsection (b)(1) clarifies that it does not apply to non-FVRA designations made under other statutory provisions.

[3] Tellingly, the committee-reported version of the FVRA used the same phrases—"person" and "under this section"—in a version of the provision that unambiguously applied only to first assistants. See S. Rep. No. 250, 105th Cong., 2d Sess. 25 (1998); see also pp. 23-25, *infra*. Because the "person" and "under this section" language was thus simply carried over from a version that plainly covered only first assistants, the court of appeals erred in concluding that those phrases demonstrate that Congress intended to reach a broader group than first assistants.

of a person's *past* service as first assistant, while the exception to that restriction in Subsection (b)(2) is based on the person's *current* service as a *Senate-confirmed* first assistant. Given that contrast, it is understandable that Congress would restate with completeness the criteria for Subsection (b)(2) to apply, and clarify that it applies only to currently-serving, Senate-confirmed first assistants. That structure simply serves to make the restriction in Subsection (b) (including the exception to that restriction in paragraph (2)) entirely self-contained in its treatment of first assistants serving in an acting capacity who are also nominees.[4] In sum, when the language of Subsection (b) and Section 3345's other provisions are read together, with attention to the uniform meaning and function of the directly parallel "notwithstanding" phrase in four of its subsections, the government's interpretation is on far firmer textual and structural ground than respondent's.

2. Respondent's reading of the FVRA, unlike the government's, also results in disparities in treatment among the statute's classes of acting officials that do not align with the statute's objectives.

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[4] The court of appeals also stated that the government's interpretation could create superfluity with regard to 5 U.S.C. 3345(b)(1)(A)(i), which triggers Subsection (b)(1)'s prohibition when the acting officer "did not serve in the position of first assistant" in the year preceding the vacancy. App., *infra*, 16a. The court acknowledged, however, that this provision is not superfluous if Subsection (a)(1) authorizes service by individuals who became the first assistant after the vacancy arose. *Ibid.* That is the government's understanding of Subsection (a)(1). See Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179-181 (2001).

The FVRA was enacted following appointment controversies in which a number of Senators expressed the view that Presidents were circumventing the advice-and-consent process by placing controversial nominees in non-PAS posts and then designating them to fill PAS positions in an acting capacity, without those nominees' ever being confirmed by the Senate. See, *e.g.*, 144 Cong. Rec. 12,432 (June 16, 1998) (statement of Sen. Thompson); *id.* at 12,434 (statement of Sen. Thurmond). That concern came to the foreground in 1997, after the Senate returned the nomination of a candidate from outside government service to be the Assistant Attorney General for the Civil Rights Division of the Department of Justice. Following the Senate's return of the nomination, the Attorney General appointed the same candidate to occupy the position of first assistant to the same vacant office, and authorized the newly-minted first assistant to perform the duties of the vacant PAS office on an acting basis. Some Senators charged that these actions circumvented the Senate's advice-and-consent function, and sought legislation to prevent a recurrence. See *id.* at 12,434 (statement of Sen. Thurmond); 144 Cong. Rec. 22,507-22,508 (Sept. 28, 1998) (statement of Sen. Thompson); see also Morton Rosenberg, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 1 (1998); Memorandum from Morton Rosenberg, Specialist in Am. Law, *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* 1-4 (Jan. 14, 1998) (exhibit to *Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 62-100 (1998)).

The FVRA, which was enacted the year after this controversy, balanced the objective of preventing such perceived circumvention with ensuring effective execution of high-level government offices during vacancies. Thus, when a President determines that a first assistant is the person most capable of filling an office both temporarily and permanently, Congress did not generally require the President to choose between the two. Instead of disqualifying every first assistant from filling a PAS office in an acting capacity if nominated, Congress barred such service only in circumstances where concerns about circumvention of the Senate and manipulation are most acute. In particular, the requirement that a first assistant have served as such for 90 days in the year before the vacancy in order to serve as both acting PAS officer and nominee, 5 U.S.C. 3345(b)(1), substantially reduces the potential for circumvention of the advice-and-consent process, by ensuring that a chosen nominee cannot simply be placed in a first-assistant position when a vacancy occurs. See S. Rep. No. 250, 105th Cong., 2d Sess. 13 (1998) (Senate Report) ("The Committee believes that the length of service of the first assistant eligible to be both the nominee and the acting officer should be sufficiently long to prevent manipulation of first assistants to include persons highly unlikely to be career officials."). And by providing that first assistants may serve as both acting officers and nominees without satisfying the 90-days-of-prior-service test when those first assistants were themselves presidentially appointed and Senate-confirmed, Congress allowed for the continued service of recent first-assistant appointees whose selection as acting officers

is especially unlikely to be an attempt at Senate circumvention. 5 U.S.C. 3345(b)(2).

Respondent's reading of the FVRA, by contrast, would introduce distinctions among acting officers that are unsupported by consideration of this history or of the statute's structure. Congress had no reason to extend beyond Subsection (a)(1) the limits in Subsection (b)(1) that prevent use of eleventh-hour first-assistant appointments to circumvent Senate review. That is because Subsections (a)(2) and (a)(3) contain their own corresponding limitations tailored to the presidential designation authority in those paragraphs. Individuals directed to serve as acting officers under Subsection (a)(2) *already* occupy Senate-confirmed positions, and are therefore unlikely to have been directed to perform the functions of the vacant PAS office in an attempt to circumvent the Senate's advice-and-consent role. In that respect, they are like the Senate-confirmed *first assistants* who are allowed to serve as acting PAS officers by virtue of Subsection (b)(2), without satisfying the requirement of 90 days' service as first assistant prior to the vacancy. And individuals in senior agency positions directed to serve as acting officers under Subsection (a)(3) *already* must have been serving in their senior agency positions for at least 90 days during the year preceding occurrence of the vacancy—thereby satisfying a 90-day-minimum-service requirement that is directly parallel to the one that Subsection (b)(1) imposes on first assistants to avoid circumvention through eleventh-hour appointments. In short, Subsections (a)(2) and (a)(3) already subject the other categories of acting officers to safeguards against

circumvention that correspond to those that Subsections (b)(1) and (b)(2) provide for first assistants.

The Executive Branch's longstanding interpretation thus provides the same treatment for officers and employees who are similarly situated in terms of the policy concerns underlying Subsection (b)(1). The court of appeals' approach, in contrast, introduces disparities between the treatment of classes of acting officials that the court did not even seek to justify. For instance, it renders virtually all officers already serving in *Senate-confirmed* offices ineligible to fill vacant PAS offices in an acting capacity following their nominations, regardless of their length of service, even though a *non-Senate-confirmed* first assistant can serve and also be the nominee as long as he occupied his position for at least 90 days before the vacancy arose. There is no indication that Congress intended to bar acting service by officers who meet Senate-confirmation or longevity-of-service requirements analogous to those constraining acting service by first assistants. And such a construction would undermine effective government operations by routinely requiring that acting officers with deep agency ties give up their acting responsibilities if nominated.

The Executive Branch's interpretation has been in place since the FVRA's enactment and has been applied to numerous acting designations and nominations in the intervening years. As far as the government is aware, that interpretation never prompted objection from the Senate prior to the issuance of the decision below.[5] Nor has Congress amended the

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[5] Following the decision below, several Senators have called into question the service of acting nominees in light of that decision. See p. 28-29, *infra*.

FVRA to foreclose it. On the contrary, across three Administrations, the Senate has regularly confirmed nominees who continued serving as acting PAS officers under Subsection (a)(2) or (a)(3) following nomination, even though such officers had not previously served as first assistants. The lack of recorded Senate objection, in a setting in which Congress has shown considerable vigilance in protecting its constitutional prerogatives, adds substantial weight to the Executive Branch's interpretation. That is especially so since the General Accounting Office, an instrumentality of Congress, agreed with the Executive Branch's interpretation in 2001. See Joyner 3-4.

3. Finally, the Executive Branch's interpretation is strongly supported by the FVRA's legislative history. The version of Section 3345 voted out of the Senate Committee contained provisions parallel to Subsections (a)(1) and (a)(2) for first assistants automatically to perform the functions and duties of a vacant PAS office, and in the alternative for the President to direct a PAS officer to do so, but it did not authorize the President to direct individuals serving in senior agency positions to serve as acting officers (as Subsection (a)(3) as enacted does). As the court of appeals acknowledged, the reported bill's limitation in Subsection (b) on service during the pendency of a nomination clearly applied only to first assistants, although it would have required 180 days of service as first assistant rather than the 90 days required by Subsection (b)(1) as finally enacted. See Senate Report 25.

That version engendered objections from numerous Senators who felt the bill did not give the President sufficient flexibility. See Senate Report 31. They urged two changes relevant here: one to add a cate-

gory of acting officers similar to that in Subsection (a)(3) as enacted, and the other to shorten "the length of service requirement for first assistants who are nominees." *Ibid.* Senators echoed those concerns during floor debates, and they successfully urged the Senate to defeat cloture so that flexibility-enhancing amendments could be offered. See 144 Cong. Rec. at 22,512-22,514 (statement of Sen. Levin); *id.* at 22,515-22,518 (statement of Sen. Durbin); *id.* at 22,519-22,520 (statement of Sen. Glenn); *id.* at 22,524-22,525 (statement of Sen. Lieberman); *id.* at 22,526.

As finally enacted, Section 3345 included several amendments, in response to the concerns and proposals of those Senators, to enhance the flexibility of the statute. Those amendments (i) created the new Subsection (a)(3) category of persons who can be directed to serve in an acting capacity if they have served in senior agency positions for 90 days in the year prior to the occurrence of the vacancy, and (ii) reduced the time-in-service requirement in Subsection (b) for first assistants who are nominees to 90 days from 180 days. Senate Report 13. It makes little sense to think that those flexibility-enhancing amendments expanded the *restriction* in Subsection (b)(1) on serving as an acting officer after being nominated, so that the restriction would apply not only to first assistants, but also to persons designated by the President pursuant to Subsections (a)(2) and (a)(3).

The explanation in the Senate of the language ultimately enacted confirms that they did not. After the bill was reported by the Senate Committee, Senator Thompson, the chairman of the committee and sponsor of the bill, submitted an amendment that would have revised Subsection (b) to read essentially as it

was finally enacted, reducing the length-in-service requirement from 180 days to 90 days. 144 Cong. Rec. 22,015 (Sept. 25, 1988). During the debate on cloture, Senator Glenn stated that he intended to offer amendments to add essentially what became Subsection (a)(3) and to "further decrease" the time-in-service requirement "for a first assistant who will be an acting officer and the nominee to 45 days." 144 Cong. Rec. at 22,519.

Afterward, the cloture vote failed, and the FVRA ultimately was enacted as part of broader legislation. In identifying the changes made to the committee bill as it was added to the broader legislation, Senator Thompson explained that the 180-day period in Subsection (b) "governing the length of service prior to the onset of the vacancy that the *first assistant* must satisfy" was reduced from 180 days to 90 days. 144 Cong. Rec. 27,496 (Oct. 21, 1998) (emphasis added). This was an obvious compromise between the 180-day-time-in-service requirement in the committee bill that was expressly limited to persons who were first assistants and nominees, and the 45-day requirement Senator Glenn proposed, also expressly for "first assistants." Senate Report 25; 144 Cong. Rec. at 22,519. And Senator Thompson expressly declared that "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies *only* when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§3345(a)(2) or 3345(a)(3).*" 144 Cong. Rec. 27,496 (emphasis added). That is exactly the Executive Branch's longstanding interpretation, and the one that

multiple Presidents have repeatedly acted upon since the FVRA was enacted.[6]

B. This Case Presents An Important Question Warranting Immediate Review By This Court

The court of appeals' decision is not only wrong and contrary to settled interpretation and practice, but the court's interpretation of the FVRA also significantly curbs the President's appointment authority. This case therefore presents a question of exceptional importance that warrants this Court's review. That review is especially appropriate because of the practical uncertainty the decision generates regarding service of high-level government officers, because the D.C. Circuit's broad jurisdiction may be invoked by future litigants to subject most agency actions to its ruling, and because the question should be settled to remove uncertainty regarding the interaction of the President's powers of appointment and designation for the benefit of the next Administration.

1. The question presented is one of exceptional importance. The selection of individuals to fill high-level posts in the Executive Branch implicates core powers

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[6] Senator Thompson's explanation, and Senator Glenn's identical understanding, are not undermined by a passing statement of Senator Byrd that "a person may not serve as an acting officer if: (1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2), the President nominates him to fill the vacant office." 144 Cong. Rec. at 27,498; see App., *infra*, 17a-18a. Senator Byrd was not the author of the language he was addressing, and his passing statement is accordingly entitled to far less weight. That is all the more true given its obvious tension with the origins and flexibility-enhancing purpose of the change to Subsection (b)(1) discussed above.

of the President that are vital to the operation of the federal government. The rationale of the decision below substantially alters the President's authority in that area. Previously, when the President determined that the individual best qualified to perform the functions and duties of a vacant PAS office was another PAS officer or a senior agency employee, he could direct that individual to fill the vacant office in an acting capacity while also nominating him for the office. Under the court of appeals' analysis, however, the President must either choose someone else as the acting officer; choose someone else as the nominee; or have the acting officer give up the functions and duties of the office when he is nominated, with the attendant disruption to the agency caused by yet another temporary change in leadership.

On a practical level, because the decision below rejects the Executive Branch's interpretation of the FVRA dating to almost immediately after the statute's passage, the decision below calls into question high-level actions in the Executive Branch under three different Presidents. Decisions of many former acting officers, including senior officers in the HHS Centers for Medicare and Medicaid Services, DOJ, DOT, Department of Defense, the Export-Import Bank, and General Services Administration, could be open to question under the court of appeals' reasoning. Moreover, the decision below casts a cloud over the service of about half a dozen current acting high-level officers, including in the DOT, HHS, EPA, and OPM.

The impact of the decision below is heightened because of the stringent consequences that the FVRA imposes when an improperly-serving acting officer

undertakes functions and duties that are tied by statute or regulation exclusively to that particular PAS post. 5 U.S.C. 3348(a)(2). Subject to exceptions for only a few positions, the FVRA provides that if the FVRA disallows an individual's service in an acting capacity, actions taken by that individual "in the performance of any function or duty of [the] vacant office * * * have no force and effect" and "may not be ratified." 5 U.S.C. 3348(d).[7] The court of appeals' decision thus casts a cloud over many past decisions by top government officials.

Events of recent months demonstrate the potential for uncertainty and confusion created by the decision below concerning the service of key government officials. The Chairman of the Senate Armed Services Committee cited the decision in a letter declining to hold a confirmation hearing on the President's nominees for Secretary of the Army and Under Secretary of Defense for Personnel and Readiness while those individuals were serving in those offices in an acting capacity. Letter from John McCain, Chairman, U.S. Senate Comm. on Armed Servs., to Barack Obama, U.S. President (Nov. 30, 2015) (on file with the Office of Solicitor General); see Sydney J. Freedberg, Jr., *McCain Forces Fanning to Step Aside as Acting Army Secretary*, Breaking Def. (Jan. 11, 2016), http://breakingdefense.com/2016/01/mccain-forces-fanning-to-step-aside-as-acting-army-secretary/. In March 2016, the Chairman of the Senate's Environment and

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[7] There is an exception allowing ratification of the actions of NLRB's General Counsel. See 5 U.S.C. 3348(e)(1); App., *infra*, 21a-22a. That narrow exception in no way undermines the need for review of the question presented, which has Executive-Branch-wide significance.

Public Works Committee sent a letter to the EPA that cited the court of appeals decision as a basis for questioning the continued service of the agency's Acting Deputy Administrator. Letter from James M. Inhofe, Chairman, U.S. Senate Comm. on Env't & Pub. Works, to Gina McCarthy, Adm'r, EPA (Mar. 8, 2016), http://www.epw.senate.gov/public/_cache/files/0da0f6d1 1eed-43f5-aa11-9dec604fa31d/meiburg-030816-letter-to-epa.pdf; see also Memorandum from Patrick E. McFarland, OPM Inspector Gen., to Beth F. Cobert, Acting Dir., *Violation of the Federal Vacancies Reform Act* (Feb. 10, 2016), https://www.opm.gov/our-inspector-general/special-reports-and-reviews/violation-of-the-federal-vacancies-reform-act.pdf (citing the decision below and opining, contrary to the Executive Branch's position, that the current Acting Director of OPM cannot validly serve in that role under the court's decision). This Court's intervention is necessary to eliminate uncertainty concerning high-level government service, and to definitively resolve the construction of a provision that involves core statutory and constitutional powers of the Executive.

2. Certiorari is particularly warranted due to the D.C. Circuit's broad jurisdiction over agency actions. The court below appears to have been the first appellate court to construe the instant FVRA provision. Since then, one other court has considered the provision's meaning, and agreed with the view of the panel below, in the context of another challenge to actions by Solomon during his service as Acting General Counsel of the NLRB. *Hooks* v. *Kitsap Tenant Support Servs., Inc.*, No. 13-35912, 2016 WL 860335, at *1

(9th Cir. Mar. 7, 2016).[8] Because of the D.C. Circuit's exceptionally broad jurisdiction over administrative actions, however, if this Court declines to grant review in this case, future litigants seeking to challenge agency actions under the FVRA would be likely to bring suit in the District of Columbia. See, *e.g.*, 28 U.S.C. 1391(e)(1)(A). Accordingly, if the decision below goes unreviewed, it is likely as a practical matter to operate as a substantial constraint on the President's selection of nominees and acting officials. This Court should accordingly grant a writ of certiorari now, to resolve this question of exceptional importance.

3. Finally, this Court's review is particularly appropriate because of the change of Administrations that will occur in January 2017. As Administrations change, PAS officers leave government service, and it is common for agencies to be staffed by a large number of acting officers until the new President's nominees have been able to gain confirmation. This Court

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[8] In pending cases in three other circuits, litigants have sought to challenge actions of Solomon during his service as Acting General Counsel of the NLRB on grounds similar to those raised here. See *NLRB* v. *Pier Sixty, LLC*, No. 15-1841 (2d Cir.); *1621 Route 22 W. Operating Co.* v. *NLRB*, No. 15-2466 (3d Cir.); *Ohio Edison Co.* v. *NLRB*, No. 15-1783 (6th Cir.). However, none of those litigants raised their claims before the Board. Accordingly, NLRB has argued that those litigants forfeited their FVRA challenges—an argument that would make it unnecessary for those courts of appeals to ever reach the question presented here. Cf. App., *infra*, 30a (explaining that court "address[ed] the FVRA objection in this case because [respondent] raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding" and noting that it "doubt[ed] that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success").

should grant review to ensure that the new President will not face uncertainty during that transitional time regarding the legal constraints that govern his or her selection of acting officers and nominees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 14-1107, 14-1121

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Argued: Mar. 10, 2015
Decided: Aug. 7, 2015

Before: HENDERSON, SRINIVASAN and WILKINS, Circuit Judges.

Opinion for the Court filed by Circuit Judge HENDERSON.

KAREN LECRAFT HENDERSON, Circuit Judge:

This case involves a labor dispute between an ambulance company and its employees. We do not reach the merits of that dispute, however, because we conclude that Lafe Solomon, the former Acting General Counsel of the National Labor Relations Board (NLRB or Board), served in violation of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 *et seq.* Accordingly, the unfair labor practice (ULP) complaint issued against the ambulance company was unauthorized. We grant

the petition for review, deny the cross-application for enforcement and vacate the Board's order.

I. BACKGROUND

A. VACANCY STATUTES

The FVRA is a response to what Chief Justice John Marshall called "the various crises of human affairs"—problems that arise when our Constitution confronts the realities of practical governance. *M'Culloch v. Maryland*, 17 U.S. 316, 415, 4 Wheat. 316, 4 L. Ed. 579 (1819). Specifically, the Appointments Clause generally requires "Officers of the United States" to be nominated by the President "by and with the Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2. Advice and consent is "more than a matter of etiquette or protocol"; it is a "structural safeguard[ ]" intended to "curb Executive abuses of the appointment power" and to "promote a judicious choice of persons for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997) (quotation marks and alterations omitted). But vacancies can occur unexpectedly (due to death, resignation, illness, etc.) and the confirmation process takes time. *See* ANNE JOSEPH O'CONNELL, WAITING FOR LEADERSHIP at 10 fig. 5 (2010) (finding average lag time of 190 days between vacancy and confirmation). To keep the federal bureaucracy humming, the President needs the power to appoint acting officers who can serve on a temporary basis without first obtaining the Senate's blessing.

Since the "beginning of the nation," the Congress has given the President this power through vacancy statutes. *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervi-*

sion, 139 F.3d 203, 209-10 (D.C. Cir. 1998) (citing, *inter alia*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281).[1] The predecessor to the FVRA, the Vacancies Act, was first enacted in 1868. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. The Vacancies Act allowed the President to fill vacancies with temporary acting officers, subject to limitations on whom he could appoint and how long the appointee could serve. *See* Pub. L. No. 89-554, 80 Stat. 378, 426 (Sept. 6, 1966); Pub. L. No. 100-398, 102 Stat. 985, 988 (Aug. 17, 1988).

Presidents, however, have not always complied with the Vacancies Act. *See* MORTON ROSENBERG, CONG. RESEARCH SERV., 98-892 A, THE NEW VACANCIES ACT: CONGRESS ACTS TO PROTECT THE SENATE'S CONFIRMATION PREROGATIVE 2-3 (1998). By 1998, an estimated 20% of all officers in positions requiring presidential nomination and Senate confirmation (PAS positions) were serving in a temporary acting capacity, many well beyond the time limits prescribed in the Vacancies Act. *See id.* at 1. Nor was the Vacancies Act particularly amenable to judicial enforcement. In *Doolin*, for example, we did not decide whether the acting director of the Office of Thrift Supervision lacked statutory authority because we determined that any error in his appointment was cured. *See* 139 F.3d at 214. We relied on the doctrine of ratification: because the director's decision was later approved by a properly appointed

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[1] The Constitution also partially addresses this problem. The President can temporarily fill vacancies "that may happen during the Recess of the Senate." U.S. CONST. art. II, § 2, cl. 3. But the Recess Appointments Clause is an incomplete answer because the President may need to install an acting officer *before* the Senate's next recess.

director, any defect in his appointment was immaterial. *See id.* at 212-14. Our decision in *Doolin*, along with the President's appointment of Bill Lann Lee to be Acting Attorney General of Civil Rights in 1997, prompted congressional action. *See* ROSENBERG, *supra*, at 1, 8.

In June 1998, Senators Fred Thompson, Robert Byrd, Strom Thurmond and others introduced the FVRA to strengthen, and ultimately replace, the Vacancies Act. *See* 144 CONG. REC. S6413-14 (daily ed. June 16, 1998) (statement of Sen. Thompson). The statute was framed as a reclamation of the Congress's Appointments Clause power. *See id.* at S6413 ("This legislation is needed to preserve one of the Senate's most important powers: the duty to advise and consent on presidential nominees."); S. REP. NO. 105-250, at 5 (1998) ("If the Constitution's separation of powers is to be maintained, ... legislation to address the deficiencies in the operation of the current Vacancies Act is necessary. ... [T]he Senate's confirmation power is being undermined as never before."). After some amendment, the FVRA was enacted in October 1998. *See* Pub. L. No. 105-277, div. C, tit. I, § 151.

The FVRA provides that, in the event of a vacancy in a PAS position, the "first assistant" automatically takes over in an acting capacity. 5 U.S.C. § 3345(a)(1). The President can also choose to appoint a senior employee from the same agency or a PAS officer from another agency to serve as the acting officer. *Id.* § 3345(a)(3), (a)(2). Generally speaking, an acting officer can serve no longer than 210 days and cannot become the permanent nominee for the position. *See id.* §§ 3346; 3345(b). Moreover, in response to *Doolin*, the FVRA renders actions taken by persons serving in violation of the Act void ab initio. *See id.* § 3348(d)(1)-(2) ("An action taken by

any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified."); *see also* 144 CONG. REC. S6414 (explaining that the FVRA "impose[s] a sanction for noncompliance," thereby "[o]verruling several portions of [*Doolin*]"); S. REP. NO. 105-250, at 5 ("The Committee . . . finds that th[e ratification] portion of [*Doolin*] demands legislative response. . . . ").

B. NLRB GENERAL COUNSEL VACANCY

Under the National Labor Relations Act (NLRA), the General Counsel of the NLRB must be appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(d). He is primarily responsible for prosecuting ULP cases before the Board. *Id.* Indeed, the Board cannot adjudicate a ULP dispute until the General Counsel decides a charge has merit and issues a formal complaint. *See id.* § 160(b); 29 C.F.R. §§ 102.9, 102.15. To manage the volume of ULP charges filed each year, the General Counsel has delegated his authority to investigate charges and issue complaints to thirty-two regional directors. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 139, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975) (citing 29 C.F.R. §§ 101.8; 102.10). The General Counsel, however, retains "final authority" over charges and complaints and exercises "general supervision" of the regional directors. 29 U.S.C. § 153(d).

In June 2010, Ronald Meisburg resigned as NLRB General Counsel. The President directed Lafe Solomon, then—Director of the NLRB's Office of Representation Appeals, to serve as the Acting General Counsel in Meisburg's stead. *See* Memorandum from the White House for Lafe E. Solomon (June 18, 2010). The President cited the FVRA as the authority for Solomon's appointment.

See id. (invoking "section 3345(a) of title 5").[2] On January 5, 2011—six months into Solomon's temporary appointment—the President nominated him to be General Counsel. 157 CONG. REC. S69 (daily ed. Jan. 5, 2011). The Senate, however, returned Solomon's nomination. 159 CONG. REC. S17 (daily ed. Jan. 3, 2013). The President resubmitted Solomon's nomination on May 24, 2013, 159 CONG. REC. S3884 (daily ed. May 23, 2013), but ultimately withdrew it and nominated Richard Griffin instead, who was confirmed by the Senate on October 29, 2013. 159 CONG. REC. S7635 (daily ed. Oct. 29, 2013). All told, Solomon served as Acting General Counsel from June 21, 2010 to November 4, 2013.

C. BOARD PROCEEDINGS AGAINST SOUTHWEST

SW General, Inc. (Southwest) provides ambulance services to hospitals in Arizona. Its emergency medical technicians, nurses and paramedics are represented by the International Association of Fire Fighters Local I-60, AFL-CIO (Union). The most recent collective bargaining agreement between Southwest and the Union contained a "Longevity Pay" provision, guaranteeing annual bonuses to Southwest employees who had been with the company for at least ten years. In December 2012—after the collective bargaining agreement expired but

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[2] The NLRA also authorizes the appointment of a temporary Acting General Counsel. *See* 29 U.S.C. § 153(d); *see also* S. REP NO. 105-120, at 16 (FVRA does not override appointment provision in NLRA (referencing 5 U.S.C. § 3347(a)(1)(A))). The President did not invoke the NLRA when appointing Solomon, however—perhaps because the FVRA allows an acting officer to serve for a longer period of time. *Compare* 29 U.S.C. § 153(d) (permitting service for 40 days, tolled while nomination is pending before Senate), *with* 5 U.S.C. § 3346 (permitting service for 210 days, tolled while first or second nomination is pending before Senate).

before the parties negotiated a replacement—Southwest stopped paying the longevity bonuses.

The Union immediately filed a ULP charge with the NLRB. Regional Director Cornele Overstreet issued a formal complaint on January 31, 2013, alleging that Southwest had unilaterally discontinued longevity payments in violation of sections 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(1), (5). After a hearing, an administrative law judge (ALJ) agreed that Southwest had committed a ULP. Southwest filed fifteen exceptions to the ALJ's decision, the second of which challenged the ULP complaint on the ground that Acting General Counsel Solomon was serving in violation of the FVRA. *See* Resp't's Exceptions to ALJ Decision at 1 ¶ 2, No. 28-CA-094176 (Sept. 5, 2013). In May 2014, the NLRB adopted the ALJ's recommended order with only minor modifications, *see* 360 N.L.R.B. No. 109 (2014), and it did not address Southwest's FVRA challenge.

Southwest petitioned this Court for review and the Board cross-petitioned for enforcement. We have jurisdiction pursuant to 29 U.S.C. § 160(f), (e).

II. ANALYSIS

Southwest maintains that, as of January 2011, Acting General Counsel Solomon was serving in violation of the FVRA and, thus, the ULP complaint issued against it in January 2013 was invalid. Specifically, Southwest argues that Solomon became ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel. *See* 5 U.S.C. § 3345(b)(1).[3] In its

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[3] We note that Solomon's nomination was no longer pending when the ULP complaint issued against Southwest: the Senate had returned it and the President had not yet resubmitted it. The

original brief, the Board vigorously contested Southwest's reading of the statute but made no argument—except in a lone footnote—about the *consequences* of an FVRA violation. We therefore asked the parties to submit supplemental briefs addressing whether an FVRA violation, assuming one occurred, would nonetheless be harmless error. With the benefit of the parties' arguments, we now conclude that (A) Solomon was serving in violation of the FVRA when the complaint issued against Southwest and (B) the violation requires us to vacate the Board's order.

A.

The key provision of the FVRA, for present purposes, is section 3345. For ease of reference, we quote the provision in full:

§ 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

Board, however, does not argue that the non-pendency of Solomon's nomination should make a difference in our analysis. We therefore assume it does not.

We also note that the complaint against Southwest was issued by Regional Director Overstreet pursuant to a *delegation* of authority from Solomon. The Board, however, does not argue that this delegation survives any defect in the General Counsel's authority. We, again, assume *arguendo* that it does not.

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of

> a term of office is an inability to perform the functions and duties of such office.

5 U.S.C. § 3345.

Solomon became Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. As the Director of the Office of Representation Appeals for the previous ten years, Solomon easily met the salary and experience requirements of that subsection. *See id.* § 3345(a)(3)(A)-(B). According to Southwest, however, Solomon could no longer serve as Acting General Counsel once the President nominated him in January 2011 to be General Counsel. Subsection (b)(1) of the FVRA prohibits a person from being both the acting officer and the permanent nominee unless (1) he served as the first assistant to the office in question for at least 90 of the last 365 days or (2) he was confirmed by the Senate to be the first assistant. *See id.* § 3345(b)(1)-(2). Solomon was never a first assistant *at all* so the exceptions plainly do not apply to him. The Board, however, contends that the prohibition in subsection (b)(1) governs only an acting officer who assumes the position pursuant to subsection (a)(1), not an acting officer who is directed to serve by the President pursuant to subsections (a)(2) or (a)(3). Thus, the pivotal question is whether the prohibition in subsection (b)(1) applies to *all* acting officers, as Southwest contends, or just first assistants who become acting officers by virtue of subsection (a)(1), as the Board contends. Considering this question de novo,[4] we think Southwest has the better argument.[5]

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[4] The NLRB is not entitled to *Chevron* deference when it interprets the FVRA, "a general statute not committed to [its] administration." *Soc. Sec. Admin. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir.

The first independent clause of subsection (b)(1) is the clearest indication of its overall scope. That clause states that "*a person* may not serve as an acting officer for an office under *this section*." 5 U.S.C. § 3345(b)(1) (emphases added). The term "a person" is broad; it covers the full spectrum of possible candidates for acting officer. *See Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 312, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978) ("the phrase 'any person'" has a "naturally broad and inclusive meaning"). And the phrase "this section" plainly refers to section 3345 in its entirety. Throughout the FVRA, the Congress was precise in its use of internal cross-references. *See, e.g.*, 5 U.S.C. §§ 3345(b)(2)(A) ("subsection (a)"); 3345(c)(1) ("subsection (a)(1)"); 3345(c)(2) ("this section and sections 3346, 3347, 3348 . . "); 3345(a)(2)-(3) ("paragraph (1)"); 3348(e) ("this section"). If the Congress had wanted to enact the Board's understanding, it would have said "first assistant" and "that subsection"

2000). We also note that, in 1999, the Office of Legal Counsel (OLC) endorsed the NLRB's interpretation of subsection (b)(1). *See* Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999) ("The limitation on the ability to be the nominee for the vacant position and to serve as the acting officer applies only to persons who serve as acting officers by virtue of having been the first assistant to the office."). But the OLC is not entitled to *Chevron* deference either. *See Crandon v. United States*, 494 U.S. 152, 177, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990) ("advisory opinion[ ] of the OLC is not an administrative interpretation that is entitled to deference under *Chevron* ").

[5] Our decision is in accord with the two other courts that have considered the question. *See Hooks v. Remington Lodging & Hospitality, LLC*, 8 F. Supp. 3d 1178, 1187-89 (D. Alaska 2014); *Hooks v. Kitsap Tenant Support Servs., Inc.*, No. 13-cv-5470, 2013 WL 4094344, at *2 (W.D. Wash. Aug. 13, 2013).

instead of "a person" and "this section." Thus, the plain language of subsection (b)(1) manifests that no person can serve as both the acting officer and the permanent nominee (unless one of the exceptions in subsections (b)(1)(A) or (b)(2) applies).

The Board's main argument to the contrary focuses on the first dependent clause in subsection (b)(1): "Notwithstanding subsection (a)(1)." According to the Board, the "notwithstanding" clause limits subsection (b)(1)'s prohibition to first assistants who become acting officers pursuant to subsection (a)(1). There are several flaws with this argument. For starters, it is not what the word "notwithstanding" means. *See Sandifer v. U.S. Steel Corp.*, — U.S. —, 134 S. Ct. 870, 876, 187 L. Ed. 2d 729 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (quotation marks omitted)). "Notwithstanding" means "in spite of," OXFORD ENGLISH DICTIONARY (2d ed. 1989); BLACK'S LAW DICTIONARY (10th ed. 2014) —not, as the Board would have it, "for purposes of" or "with respect to." Here, then, the "notwithstanding" clause means "to the extent that subsection (a)(1) deviates from subsection (b)(1), subsection (b)(1) controls." *See United States v. Fernandez*, 887 F.2d 465, 468 (4th Cir. 1989) (proviso "'notwithstanding any other provision of law' . . . naturally means that the [statute] should not be limited by other statutes"); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 126 (Thompson/West 2012) ("A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces . . . derogates from the provision to which it refers."). The Congress likely referenced subsection (a)(1) to clarify that its

command—that the first assistant "shall" take over as acting officer—does not supersede the prohibition in subsection (b)(1). But, apart from setting out an order of operations, the "notwithstanding" clause has no significance for the ultimate scope of subsection (b)(1). *See Kucana v. Holder*, 558 U.S. 233, 238-39 n.1, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010) ("The introductory clause ['Notwithstanding any other provision of law'] does not define the scope of [the statute]. It simply informs that once the scope of the [statute] is determined, [it applies] regardless of what any *other* provision or source of law might say.").

Context further refutes the Board's "notwithstanding" argument. As discussed, the Board's interpretation of "notwithstanding" is irreconcilable with the breadth of the words "a person" and "this section" in the remainder of the introductory clause. *See Maracich v. Spears*, — U.S. —, 133 S. Ct. 2191, 2205, 186 L. Ed. 2d 275 (2013) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."); *cf. also United States v. Emerson*, 270 F.3d 203, 233 n.32 (5th Cir. 2001) ("[W]here the preamble and the operative portion of the statute may reasonably be read consistently with each other, the preamble may not properly support a reading of the operative portion which would plainly be at odds with what otherwise would be its clear meaning."). Indeed, the only other time section 3345 uses the phrase "a person" is in subsection (a)(2) and, there, the phrase is plainly not limited to a first assistant. Moreover, the Congress used the word "notwithstanding" several times in section 3345. *See* 5 U.S.C. §§ 3345(a)(2)-(3) ("notwithstanding paragraph (1)"); 3345(c)(1) ("Notwithstanding subsection (a)(1)" and "notwithstanding adjournment sine die"). Each time, it plainly meant "in spite of" rather

than "with respect to." "It is a well established rule of statutory construction that a word is presumed to have the same meaning in all subsections of the same statute." *Allen v. CSX Transp., Inc.*, 22 F.3d 1180, 1182 (D.C. Cir. 1994) (quotation marks omitted). Similarly, the Congress used the phrase "For purposes of" in subsection (c)(2), which shows that it knew how to use limiting language when it wanted to. *See Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007) ("[W]e have repeatedly held that where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings." (quotation marks and alteration omitted)). The Board's crabbed interpretation of "notwithstanding" simply does not pass muster.

Further, the Board's reading of subsection (b)(1)—but not Southwest's—renders other provisions of section 3345 superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quotation marks omitted)). In the Board's view, subsection (b)(1) applies only to subsection (a)(1)—the first assistant provision. Although we do not decide its meaning today, subsection (a)(1) may refer to the person who is serving as first assistant *when the vacancy occurs*. *Accord* 23 Op. O.L.C. at 64 ("[W]e believe . . . you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant."). Under this reading, subsection (a)(1) provides a default rule that automatically promotes someone (the current first assistant) to be

the acting officer without a break in service and without action by the President. But if subsection (a)(1) refers to the first assistant at the time of the vacancy, then the condition in subsection (b)(1)(A)(i)—that the person "did not serve in the position of first assistant to the office" in the prior 365 days—is inoperative because the current first assistant *necessarily* served as the first assistant in the previous year. If Southwest is correct that subsection (b)(1) applies to all acting officers, however, then subsection (b)(1)(A)(i) is not superfluous because many PAS officers (subsection (a)(2)) and senior agency employees (subsection (a)(3)) will not have served as the first assistant in the prior year.

At oral argument, the Board argued—consistent with a revised OLC opinion—that subsection (a)(1) also applies to a person who becomes first assistant *after* the vacancy occurs. Oral Arg. Recording 17:02-30:24; *accord* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179-81 (2001). This interpretation, the Board contends, gives a nonsuperfluous meaning to subsection (b)(1)(A)(i). Yet, the Board's interpretation faces another surplusage problem. Section 3345(b)(2)(A) allows an acting officer to also be the permanent nominee if, *inter alia*, he "is serving as [a] first assistant." But the current first assistant—whether he became first assistant before or after the vacancy—is *necessarily* serving as a first assistant. The Board's interpretation (which reads "person" in subsection (b) to mean "first assistant") creates surplusage whereas Southwest's interpretation (which reads "person" to mean "first assistant, PAS officer or senior agency employee") does not.

Perhaps sensing the weakness of its textual arguments, the Board falls back on legislative history and statutory purpose to support its interpretation. Its argument needs to be quite strong because, to repeat, the text of the FVRA plainly supports Southwest. *See Milner v. Dep't of Navy*, 562 U.S. 562, 572, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."); *Kloeckner v. Solis*, — U.S. —, 133 S. Ct. 596, 607 n.4, 184 L. Ed. 2d 433 (2012) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text."). As we shall see, however, the Board's argument is anything but.

The Board first points to a floor statement by Senator Thompson, the chief sponsor of the FVRA. Thompson presaged the Board's view, stating, "Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)." 144 CONG. REC. S12,822 (daily ed. Oct. 21, 1998). Yet, a statement of a single Senator—even the bill's sponsor—is only weak evidence of congressional intent. *See Zuber v. Allen*, 396 U.S. 168, 186, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969) ("Floor debates reflect at best the understanding of individual Congressmen."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."). Moreover, Thompson was immediately contradicted by Senator Byrd—an "original sponsor" of the FVRA. 144

CONG. REC. S12,824 (statement of Sen. Byrd). Byrd's statement[6] hewed much more closely to the statutory text and suggested that subsection (b)(1) applies to all categories of acting officers. Thus, the floor statements are a wash. *See March v. United States*, 506 F.2d 1306, 1314 n.31 (D.C. Cir. 1974) ("[W]here, as here, [congressional debates] reflect individual interpretations that are contradictory and ambiguous, they carry no probative weight."). And Senator Thompson's statement is certainly not enough to overcome the FVRA's clear text. *See Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 12 (D.C. Cir. 2009) ("Floor statements from members of Congress, even from a bill's sponsors, cannot amend the clear and unambiguous language of a statute." (quotation marks omitted)).

The Board next cites a Senate committee report to buttress its interpretation. The report states that "a *first assistant* who has not received Senate confirmation, but who is nominated to fill the office permanently, can be made the acting officer only if he has been the first assistant for at least 180 days in the year preceding the vacancy." S. REP. NO. 105-250, at 2 (emphasis added). The committee report, however, is inapposite because it

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[6] "[T]he officer's position may be filled temporarily by either: (1) the first assistant to the vacant office; (2) an executive officer who has been confirmed by the Senate for his current position; or (3) a career civil servant, paid at or above the GS-15 rate, who has served in the agency for at least 90 of the past 365 days. However, *a person* may not serve as an acting officer if: (1)(a) *he is not the first assistant*, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2), the President nominates him to fill the vacant office." 144 CONG. REC. S12,824 (emphases added).

discusses a *different version* of the FVRA from the one ultimately enacted. Specifically, an earlier draft of subsection (b) provided:

> (b) Notwithstanding section 3346(a)(2), a person may not serve as an acting officer for an office under this section, if—
>
> (1) on the date of the death, resignation, or beginning of inability to server of the applicable officer, such person serves *in the position of first assistant* to such officer;
>
> (2) during the 365-day period preceding such date, such person served *in the position of first assistant* to such officer for less than 180 days; and
>
> (3) the President submits a nomination of such person to the Senate for appointment to such office.

Id. at 25 (emphases added). This version of subsection (b) manifestly applies to first assistants only. But the version ultimately enacted looks quite different. In fact, the change in phraseology weighs somewhat *against* the Board's interpretation. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1289 (D.C. Cir. 2000) ("The fact that Congress specifically rejected language favorable to [a party's] position and enacted instead language that is consistent with [the opponent's] interpretation only strengthens our conclusion that the [opponent] has correctly ascertained Congress' intent. . . . ").

Finally, the Board contends that Southwest's interpretation of subsection (b)(1) defeats the purpose behind subsections (a)(2) and (a)(3): namely, "expanding the pool of potential acting officers beyond first assistants." Resp't's Br. 38. But accepting Southwest's in-

terpretation in no way decreases the pool of people eligible to be an acting officer; it merely decreases the pool of people eligible to be both the acting officer *and* the permanent nominee.

In short, the text of subsection (b)(1) squarely supports Southwest's interpretation and neither the legislative history nor the purported goal of the FVRA helps the Board. We therefore hold that the prohibition in subsection (b)(1) applies to all acting officers, no matter whether they serve pursuant to subsection (a)(1), (a)(2) or (a)(3). Because Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011, the FVRA prohibited him from serving as Acting General Counsel from that date forward.

B.

Having concluded that Solomon was serving in violation of the FVRA when the ULP complaint issued against Southwest, we must now determine the consequence of that violation. Southwest believes we *must* vacate the Board's order. If the violation had occurred in the typical federal office, we might agree. The FVRA renders any action taken in violation of the statute void ab initio: section 3348(d) declares that "[a]n action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d)(1)-(2). Moreover, without a valid complaint, the Board could not find Southwest liable for a ULP. *See* 29 U.S.C. § 160(b) (requiring complaints); *NLRB v. Dant*, 344 U.S. 375, 382, 73 S. Ct. 375, 97 L. Ed. 407 (1953) ("[T]he remedial processes of the [NLRA] to cure [unfair labor] practices . . . can only be invoked by the issuance of a complaint."); *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325, 71 S. Ct. 758, 95 L. Ed. 969

(1951) ("The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid.").

But this is not the typical case. Section 3348(e)(1) exempts "the General Counsel of the National Labor Relations Board" from the provisions of "section [3348]," including the void-ab-initio and no-ratification rules. *See* 5 U.S.C. § 3348(e)(1).[7] The Board contends that section 3348(e)(1) allows it to raise arguments like harmless error and the de facto officer doctrine. *See generally* 5 U.S.C. § 706 (in reviewing agency action, "due account shall be taken of the rule of prejudicial error"); *Doolin*, 139 F.3d at 212-14. We therefore assume that section 3348(e)(1) renders the actions of an improperly serving Acting General Counsel *voidable*, not void, and consider the two

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[7] According to a Senate committee report, section 3348(e) was intended to exempt the General Counsel of the NLRB from "the vacant office provisions" of the FVRA. S. REP. NO. 105-250, at 20. The vacant office provision is section 3348(b), which provides that, absent compliance with the FVRA, an office must "remain vacant" and "only the head of [the] Executive agency may perform any function or duty of such office." 5 U.S.C. § 3348(b)(1)-(2). The Congress did not want the "head" of the NLRB—*i.e.*, the Board members—to perform the duties of the General Counsel because the NLRA intentionally "separate[s] the official who investigate[s] and charge[s] [ULPs] from the officials who determine whether th[e] statute ha[s] actually been violated." S. REP. NO. 105-250, at 20; *see also Haleston Drug Stores v. NLRB*, 187 F.2d 418, 421 n.3 (9th Cir. 1951). "If the nondelegable duties of the[ ] general counsel were somehow to be performed by the [Board members] that policy would be obliterated." S. REP. NO. 105-250, at 20. This explains why the Congress exempted the General Counsel from *section 3348(b)* but we are unsure why the Congress also exempted the General Counsel from *section 3348(d)* (*i.e.*, the no-ratification and void-ab-initio provisions).

arguments the Board posits in its supplemental brief. We express no view on whether section 3348(e)(1) could be understood more broadly to wholly insulate the Acting General Counsel's actions even in the event of an FVRA violation. We similarly express no view on defenses the Board never raised. *See United States v. Hasting*, 461 U.S. 499, 510, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) ("[W]e are not required to review records to evaluate a harmless error claim, and do so sparingly.").

i. Harmless Error

We first address the "rule of prejudicial error." 5 U.S.C. § 706. As previously discussed, we held in *Doolin* that any statutory defect in the acting director's authority was cured because a subsequent, properly appointed director ratified his actions. *See* 139 F.3d at 213. The Board does not rely on *Doolin*'s holding—understandably, inasmuch as no properly appointed General Counsel ratified the ULP complaint against Southwest. *See generally FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98-99, 115 S. Ct. 537, 130 L. Ed. 2d 439 (1994). The Board instead relies on a paragraph of dicta from *Doolin*. In *Doolin*, we analogized a complaint in an administrative enforcement proceeding to a grand jury indictment in a criminal proceeding. *See* 139 F.3d at 212. Defects in a grand jury indictment do not constitute reversible error, *Doolin* noted, unless they "prejudiced" the defendant. *Id.* (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988)). And a defect does not prejudice the defendant if a petit jury subsequently finds him guilty beyond a reasonable doubt. *Id.* (citing *United States v. Mechanik*, 475 U.S. 66, 73, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986)). The same logic might apply, we postulated in

Doolin, if an agency adjudicator finds a petitioner liable despite a defective administrative complaint. *See id.* *Doolin* ultimately declined to rely on this hypothesis, however, because the parties had not briefed it. *See id.* Here, on the other hand, the Board brings *Doolin*'s dicta to the forefront and argues that the NLRB's final order renders harmless any defect in the ULP complaint against Southwest.

The grand jury analogy in *Doolin*, like the doctrine of harmless error generally, focuses on the existence *vel non* of "prejudice[ ]" to the petitioner. *Id.* But a petitioner need not demonstrate prejudice in the first place if the alleged error is "structural" in nature. *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000). In the grand jury context, for example, the occurrence of race or sex discrimination in the selection of grand jurors constitutes a structural error that warrants automatic reversal. *See id.* at 1130-31 (citing *Vasquez v. Hillery*, 474 U.S. 254, 261 & n.4, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (race); *Ballard v. United States*, 329 U.S. 187, 195, 67 S. Ct. 261, 91 L. Ed. 181 (1946) (sex)). In the agency context, we concluded in *Landry* that "[i]ssues of separation of powers" are structural errors that do not require a showing of prejudice because "it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss." *Id.* at 1131. "[D]emand for a clear causal link to a party's harm" would frustrate the "'prophylactic'" goal of the separation of powers—*i.e.*, "'establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.'" *Id.* (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)). *Landry* rejected the argument

that subsequent de novo review by the Federal Deposit Insurance Commission could render harmless the fact that the ALJ was serving in violation of the Appointments Clause. *See id.* at 1130-32. "If the process of final de novo review could cleanse the violation of its harmful impact," *Landry* reasoned, "then all such arrangements would escape judicial review." *Id.* at 1132.

Southwest contends that an FVRA violation is a structural error that cannot be rendered harmless by subsequent de novo review. We do not reach that question, however, because we agree with another one of Southwest's arguments. Specifically, the grand jury analogy from *Doolin* is ill-suited in this case. In a criminal proceeding, the grand jury and petit jury are similarly situated and have the same basic task: determining the defendant's guilt under the requisite standard of proof ("probable cause" and "beyond a reasonable doubt," respectively). *See Mechanik*, 475 U.S. at 70, 106 S. Ct. 938. As such, "[a] later conviction by a petit jury supplies *virtual certainty* that a properly constituted grand jury would have indicted." *Landry*, 204 F.3d at 1131 (emphasis added). Here, however, we lack the same certainty. The NLRB General Counsel is statutorily independent from the Board, *see NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124, 108 S. Ct. 413, 98 L. Ed. 2d 429 (1987); *Sears, Roebuck*, 421 U.S. at 138-39, 95 S. Ct. 1504, and he has "final authority" over the issuance of ULP complaints, 29 U.S.C. § 153(d); *see also United Food*, 484 U.S. at 126, 108 S. Ct. 413 (General Counsel has "unreviewable discretion to file and withdraw a complaint"). He essentially exercises prosecutorial discretion: he need not issue a complaint even if he believes a ULP was committed. *See United Food*, 484 U.S. at 126, 130, 108 S. Ct. 413. Moreover, the

General Counsel sets the enforcement priorities for the NLRB and generally supervises its lawyers. *See* 29 U.S.C. § 153(d); *Sears, Roebuck*, 421 U.S. at 138-42, 95 S. Ct. 1504. During oral argument, the Board conceded that, if the General Counsel's office were vacant, the NLRB "would not be issuing complaints." Oral Arg. Recording 32:51-32:57. The Board nonetheless argued that, because the type of ULP charged against Southwest was not "of substantial legal interest" to Acting General Counsel Solomon, that particular complaint did not require submission to the General Counsel's Office for review beforehand. *Id.* at 32:06-32:51. Southwest rightly points out, however, that a different General Counsel may have imposed different requirements and procedures during his tenure. *See, e.g.*, Memorandum GC 11-11 from Acting Gen. Counsel Lafe Solomon to All Reg'l Dirs., Officers-in-Charge, and Resident Officers 1 (Apr. 12, 2011) (identifying four "groups" of matters that must be submitted to General Counsel for advice, including those that "involve a policy issue in which I am particularly interested" and "involve issues as to which the law is in flux as the result of Board or court decisions"). Accordingly, notwithstanding the final Board order, we cannot be confident that the complaint against Southwest would have issued under an Acting General Counsel other than Solomon. *See Haleston Drug Stores*, 187 F.2d at 422 n.5 ("[O]scillations in rigor are characteristic of prosecuting officers."). Our uncertainty is sufficient to conclude that Southwest has carried its burden of demonstrating that the FVRA violation is non-harmless under the Administrative Procedure Act. *See Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 n.5 (D.C. Cir. 2010) (although "[t]he burden to demonstrate prejudicial error is on the party challenging agency ac-

tion," it "is not a particularly onerous requirement" (quotation marks and ellipsis omitted)). We therefore conclude that the NLRB order did not ratify or otherwise render harmless the FVRA defect in the ULP complaint against Southwest. We note, however, that our conclusion does not control whether the ineligibility of an official with prosecutorial responsibilities in other contexts should be considered harmless.

ii. De Facto Officer Doctrine

The only other argument in the Board's supplemental brief is the de facto officer doctrine. This oft-forgotten doctrine has "feudal origins," dating back to the 15th century. *Andrade v. Lauer*, 729 F.2d 1475, 1496 (D.C. Cir. 1984); *see also* Note, *The De Facto Officer Doctrine*, 63 COLUM. L. REV. 909, 909 n.1 (1963) ("The first reported case to discuss the concept of *de facto* authority was The Abbe of Fountaine, 9 Hen. VI, at 32(3) (1431)."). The doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995). In its most recent cases, however, the Supreme Court has limited the doctrine, declining to apply it when reviewing Appointments Clause challenges, *see id.* at 182-83, 115 S. Ct. 2031, and important statutory defects to an adjudicator's authority, *see Nguyen v. United States*, 539 U.S. 69, 78, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003).

In its traditional form, the de facto officer doctrine distinguishes between "direct" and "collateral" attacks on an officer's authority. *Andrade*, 729 F.2d at 1496. A collateral attack challenges "government *action* on the

ground that the officials who took the action were improperly in office." *Id.* (emphasis added). The de facto officer doctrine bars such attacks. *Id.* A direct attack, by contrast, challenges "the *qualifications* of the officer, rather than the actions taken by the officer." *Id.* (emphasis added). The de facto officer doctrine allows such attacks but they can be brought via writ of quo warranto only. *Id.* at 1496-97. To obtain quo warranto against a federal official, an interested party must petition the Attorney General of the United States to institute a proceeding in federal district court. D.C. CODE §§ 16-3501-02. If the Attorney General declines, the interested party can petition the court to issue the writ instead. D.C. CODE § 16-3503. Both the Attorney General and the court, however, have "broad discretion" to decline to make use of quo warranto. *Andrade*, 729 F.2d at 1498.

This Court has rejected the traditional version of the de facto officer doctrine. *See id.* at 1498-99. Direct action via quo warranto is too "cumbersome," we explained in *Andrade*, and "could easily operate to deprive a plaintiff with an otherwise legitimate claim of the opportunity to have his case heard." *Id.* at 1498. We disapprove of any "interpretation of the de facto officer doctrine that . . would render legal norms concerning appointment and eligibility to hold office unenforceable." *Id.* Instead, we have held that collateral attacks on an official's authority are permissible when two requirements are satisfied:

> First, the plaintiff must bring his action at or around the time that the challenged government action is taken. Second, the plaintiff must show that the agency or department involved has had reasonable notice

> under all the circumstances of the claimed defect in the official's title to office.

Id. at 1499. Both requirements are met here.

The first requirement, as stated in *Andrade*, appears on its face not to fit this case. The plaintiffs in *Andrade* filed a separate suit for injunctive and declaratory relief, *id.* at 1479, which explains the Court's instruction to "*bring* [an] *action* at or around the time the challenged government action is taken," *id.* at 1499 (emphases added). Here, by contrast, Southwest is subject to an enforcement action brought *by the NLRB*. In these circumstances, we have held, a party satisfies the first *Andrade* requirement if it challenges an officer's authority as a *defense* to the enforcement action. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). Of course, the ordinary rules of exhaustion and forfeiture still apply. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S. Ct. 67, 97 L. Ed. 54 (1952); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996). In the administrative proceedings below, Southwest raised its FVRA challenge as an exception to the ALJ decision. It therefore complied with the NLRA's jurisdictional exhaustion requirement. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court," absent "extraordinary circumstances"); *id.* at § 160(f) (incorporating § 160(e)); *see also Trump Plaza Associates v. NLRB*, 679 F.3d 822, 829 (D.C. Cir. 2012) ("Cases interpreting section 10(e) look to whether a party's exceptions are sufficiently specific to apprise the Board that an issue might be pursued on appeal."). And the Board does not assert that Southwest's challenge was otherwise untimely or forfeited. Thus, we assume it was properly preserved.

Nor does the Board contest that the second *Andrade* requirement—notice—is also satisfied here. To meet this requirement, "the agency . . . [must] actually know[ ] of the claimed defect." *Andrade*, 729 F.2d at 1499. Notice ensures that the agency has a chance to "remedy any defects (especially narrowly technical defects) either before it permits invalidly appointed officials to act or shortly thereafter." *Id.*; *see also Wilkinson v. Legal Services Corp.*, 80 F.3d 535, 538 (D.C. Cir. 1996). Here, Southwest notified the NLRB of the defect in Solomon's authority by excepting to the ALJ decision. *See Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987) ("The filing of the underlying suit . . in and of itself notified the government of appellants' . . . challenge."). The Board does not challenge the adequacy of this notice. Moreover, the notice requirement is satisfied if the agency learns of the defect from *any* source, not only the petitioner. *See Andrade*, 729 F.2d at 1499 ("[We] do[ ] not require . . . that the agency's knowledge of the alleged defect must come from the plaintiff."). The Board has not informed us when it first became aware of Solomon's problematic service. We therefore cannot say that its notice of the FVRA defect was inadequate. Accordingly, we conclude that the de facto officer doctrine does not bar Southwest from challenging Solomon's authority.

Finally, we emphasize the narrowness of our decision. We hold that the former Acting General Counsel of the NLRB, Lafe Solomon, served in violation of the FVRA from January 5, 2011 to November 4, 2013. But this case is not Son of *Noel Canning*[8] and we do not expect it to

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[8] *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), aff'd, — U.S. —, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014).

retroactively undermine a host of NLRB decisions. We address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding. We doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success. *See* 29 U.S.C. § 160(e); *Andrade*, 729 F.2d at 1499.

For the foregoing reasons, we grant the petition for review, deny the cross-application for enforcement and vacate the NLRB order.

So ordered.

APPENDIX B

SW General, Inc. d/b/a Southwest Ambulance *and* International Association of Fire Fighters Local I-60, AFL-CIO. Case 28-CA-094176

May 8, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 8, 2013, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and con-

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[1] We adopt the judge's finding that the Respondent's unilateral cessation of longevity payments violated Sec. 8(a)(5) and (1) for the reasons stated in her decision and in *Finley Hospital*, 359 NLRB No. 9, slip op. 2 (2012). The Respondent did not except to the judge's finding that it violated Sec. 8(a)(1) by informing the Union, after the fact, of its decision to cease issuing longevity payments. Accordingly, we adopt that finding as well.

Member Miscimarra does not adopt the finding that the Respondent violated Sec. 8(a)(1) by a statement it made to the Union. The complaint did not allege an 8(a)(1) violation based on such a statement, the complaint was not amended at the hearing to allege such a violation, and the parties did not litigate this issue. To the

clusions and to adopt the recommended Order as modified[2] and set forth in full below.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 2.

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contrary, the record expressly negates such an allegation. Before the Respondent presented its case in chief, it asked for a clarification of the issues in the case, and counsel for the General Counsel stated: "The alleged unfair labor practices are set forth specifically in the complaint. And those are the only allegations being made at this time. Those are the only allegations that this hearing is going to determining [sic]" (Tr. 118). Accordingly, Member Miscimarra would reverse the judge's 8(a)(1) finding. Member Miscimarra also dissents from the majority's finding that the judge properly concluded the Respondent violated Sec. 8(a)(5) by discontinuing longevity payments following expiration of the collective-bargaining agreement. Because the contract language expressly limits Respondent's longevity pay obligation to specified dates during "each year of this Agreement," Member Miscimarra believes that the Board cannot reasonably conclude the Respondent implemented a "change" by giving effect to this language and limiting its longevity payments to the agreement's term. See *Finley Hospital*, supra, 359 NLRB No. 9, slip op. at 10-12 (Member Hayes, dissenting).

The Respondent excepted to the judge's ruling to exclude CFO Roy Ryals's testimony regarding his intent in drafting the original longevity pay provision in the parties' 2001 collective-bargaining agreement. We find, for the reasons stated by the judge, that the exclusion of that testimony was not an abuse of discretion.

[2] We shall modify the judge's Conclusions of Law and recommended Order to conform to her findings and to the Board's standard remedial language. We shall substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

"2. The Charging Party, International Association of Fire Fighters Local I-60, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of full-time and regular part-time EMT, EMT-I, Paramedics, and Registered Nurses."

2. Insert the following after the judge's Conclusion of Law 3 and renumber the subsequent paragraph.

"4. The Respondent violated Section 8(a)(1) of the Act by notifying the Union, after the fact, of its decision to discontinue longevity pay."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity payments as described in article 44 of the July 1, 2009 to July 1, 2012 collective-bargaining agreement, as extended to September 8, 2012, we shall order it to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. In addition, we shall order the Respondent to rescind the unlawful change and resume issuing biannual longevity payments to eligible employees until an agreement has been reached with the Union or a lawful impasse in negotiations occurs. We shall further order the Respondent to make em-

ployees whole for any losses sustained as a result of the unlawful change, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award(s) covering periods longer than 1 year.

ORDER

The National Labor Relations Board orders that the Respondent, SW General, Inc. d/b/a Southwest Ambulance, Mesa, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Unilaterally discontinuing biannual longevity payments as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement, as extended to September 8, 2012.

(b) Notifying the International Association of Fire Fighters Local 1-60, AFL-CIO (the Union), after the fact, that Respondent had decided to cease issuing longevity payments contained in the July 1, 2009-July 1, 2012 collective-bargaining agreement, without giving the Union notice or an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the following appropriate unit:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered nurses, but excluding any oncall part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(b) Resume issuing biannual longevity payments to eligible employees as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

(c) Make employees whole for any losses sustained as a result of the unlawful change made on December 3, 2012, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in

electronic form, necessary to analyze the amount of money to be reimbursed under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Mesa, Arizona, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 3, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provid-

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ed by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2014

Mark Gaston Pearce, Chairman

Phillip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally discontinue issuing biannual longevity payments as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement, as extended through September 8, 2012.

WE WILL NOT notify the International Association of Fire Fighters Local I-60, AFL-CIO (the Union), after the fact, of our decision to cease making longevity payments contained in the July 1, 2009-July 1, 2012 collective-bargaining agreement, when we have not given the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively with the Union as the exclusive bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined by the Act.

WE WILL resume issuing biannual longevity payments to eligible employees as described in article 44 of the July 1, 2009-July 1, 2012 collective-bargaining agreement until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL make you whole, with interest, for any losses sustained as a result of the unlawful cessation of biannual longevity payments on December 3, 2012.

SW GENERAL, INC. D/B/A
SOUTHWEST AMBULANCE

The Board's decision can be found at www.nlrb.gov/case/28-CA-094176 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Daniel B. Rojas, Esq., and Paul Irving, Esq., for the Acting General Counsel.

Todd A. Dawson, Esq. (Baker & Hostetler, LLP), of Cleveland, Ohio, for the Respondent.

Philip Elias, V.P. and Union Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Phoenix, Arizona, on April 23, 2013. The Charging Party Union, International Association of Fire Fighters, Local Union I-60, AFL-CIO (the Union) filed the charge in this case on December 3, 2012, and the Acting General Counsel (AGC) issued the complaint on January 31, 2013. (GC Exhs. 1(a) and 1(c)[1] The complaint alleges that Southwest General, Inc., d/b/a Southwest Ambulance (Respondent) violated Section 8(a)(5) and (1) of the Act when it made a unilateral change in working conditions without having afforded the Union notice, and an opportunity to bargain. More specifically, the complaint alleges that upon expiration of the most recent collective-bargaining agreement, from 2009-2012 (the 2009 Agreement) (Jt. Exh. 4), Respondent unilaterally discontinued biannual longevity payments to unit employees, pursuant to said agreement. Respondent denied, in its answer[2], that it had any obligation to continue longevity payments once the 2009 Agreement expired, and denied any other unlawful conduct alleged in the complaint. The Respondent asserted several affirmative defenses, including that any contractual dispute that exists should

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[1] Exhibits received into evidence are referred to here as "GC Exh."for General Counsel Exhibit; "R Exh." for Respondent Exhibit; and "Jt. Exh." for Joint Exhibit. The parties' briefs will be referred to here as "GC Br." for General Counsel's brief, and "R Br." for Respondent's brief.

[2] During the trial, Respondent amended its answer to admit to pars. 5(a) and 5(b) of the complaint. (Tr. 89.)

be deferred to an arbitrator, and not interpreted by the Board. (GC Exh. 1(e); Tr. 222-223.)[3]

After the trial, the Acting General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of witnesses, and my observation of their demeanor, I make the following

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[3] Respondent also asserted, as an affirmative defense, that the complaint must be dismissed because the President's purported appointments of two new Board members were unconstitutional and invalid. Respondent argued that the Board lacks a quorum since the expiration of member Becker's term on January 3, 2012 (citing *New Process Steel v. NLRB*, 1380 S. Ct. 2635, 2640 (2010) (held "two [remaining Board] members may [not] continue to exercise that delegated authority once the group's (and the Board's) membership falls to two." (GC Exh. 1(e).) This argument lacks merit here, however, as the Board rejects any ruling that it does not have the requisite three-board member authority. I am aware that the United States Court of Appeals, D.C. Circuit, in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), concluded that the President's recent recess appointments to the Board were not valid. However, as noted by that Court, this conclusion is in conflict with at least three other courts of appeals' rulings. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). Thus, the Board has rejected this argument, as the issue regarding the validity of recess appointments "remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." See *G4S Regulated Security Solutions*, 359 NLRB No. 101, slip op. at 1, fn. 1 (2013), citing *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013).

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Mesa, Arizona (Respondent's facility), provides emergency and nonemergency ambulance services throughout the State of Arizona by contracting with hospitals, nursing homes, municipalities, counties and other local government entities (Tr. 119, 120-121). During a representative 1-year period, ending December 3, 2012, Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan. During that same representative period, Respondent received gross revenues in excess of $250,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties admit, and I also find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent Southwest Ambulance contracts with municipalities and other government entities, including unincorporated areas of counties within the State of Arizona to provide emergency 911 ambulance services. It also provides critical care and convalescent facility ambulance transportation services between hospitals, and between hospitals and nursing homes and vice versa. Id.

Respondent has admitted, and I find, that since 1992 (Jt. Exhs. 1(e) and 1(c)), and at all relevant time

periods here, Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has also been embodied in successive collective-bargaining agreements, including the most recent 2009 Agreement. (GC Exhs. 1(e), p. 2 and 1(c), p. 2; Jt. Exhs. 1-4; Tr. 121.) The employees of the respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and include:

> All full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(Jt. Exhs. 4; GC Ex. 1(e).)[4] The unit currently includes approximately 800 employees (Tr. 88, 121), of Respondent's Southwest Emergency Medical Services Group's Maricopa, Pinal, Pima and Graham County nonfire integrated ambulance operations. (GC Exh. 1(e); Jt. Exh. 4, p. 4.)

Respondent's chief operating officer (COO), Roy Ryals, is responsible for most of Southwest Ambulance's operations, including management-union negotiations and contract administration and internal adjudication of grievances and labor disputes. (Tr. 120.) He has participated in collective-bargaining negotiations between Respondent and the Union, as the lead negotiator or conegotiator, since at least the late 1990's or early 2000's, as well as the drafter of 2009 Agreement at issue here. (Tr. 121-124.) John Karolzak,

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[4] EMT- Emergency Medical Technician.

employed by Respondent's parent company, Rural/Metro Corporation, is Respondent's Southwest Zone vice president. Tuesday Kramer is the human resource manager and Cassandra Collins is the payroll manager. Roy Ryals and Cassandra Collins testified during the trial, but Karolzak and Kramer were not called as witnesses.[5]

The current union president is Adam Lizardi,[6] who has held that position since January 2012. Prior to that, he was the Union's business manager for several years, serving on the Union's contract negotiations team since about 2006. Other union officers with whom Lizardi works on his negotiations team are Kevin Burkhart, treasurer; P J Elias, vice president; Eddy Dobiecki and Michael Lovett, business managers (Tr. 91-92, 101). Only Lizardi testified at the hearing.

Longevity Pay

1. History

Respondent and the Union first reached an agreement on language concerning longevity pay during negotiations of their 2001 collective-bargaining agreement. This language was set forth in article 45 of that agreement, entitled "Longevity Pay"; and referred to biannual payments for long-term employees

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[5] Respondent initially denied in its answer that Ryals and Collins were supervisors, but amended its answer during the trial to admit they were supervisors and agents of Respondent. (GC Exh. 1(e); Jt. Exh. 8; Tr. 32.)

[6] Lizardi is also an Emergency Medical Technician, with just over 19 years of service with Southwest Ambulance/Respondent. (Tr. 90.)

after they reached a qualifying threshold of service with Respondent. Respondent and the Union continued to include a "Longevity Pay" article in successive collective-bargaining agreements from June 2003 through September 2009[7] (Jt. Exhs. 1-4), without any lapses in agreements between May 2001 through September 2012. (Tr. 102.) In fact, the language contained in the "Longevity Pay" articles remained virtually unchanged in these agreements, except for the 2003 Agreement, in which the parties agreed to add a separate tier of longevity pay for employees with 15 years or more seniority. (Id.)

The parties stipulated that pursuant to these collective-bargaining agreements, Respondent issued biannual longevity payments (in June and December)[8] to eligible unit employees from 2001 through June 2012, the month during which the most recent 2009 Agreement initially expired. (Jt. Exh. 8.)

According to current Union President Adam Lizardi, the Union initially wanted the longevity pay provision to give senior employees an opportunity to con-

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[7] The 2001 collective-bargaining agreement (2001 Agreement) was to remain in effect until 2004, but the parties entered into negotiations early and signed a new collective-bargaining agreement that became effective in June 2003 (2003 Agreement) through June 2006, keeping the "Longevity Pay" provision in art. 45. In the subsequent 2006 and 2009 Agreements, this provision was placed in art. 44. The 2006 Agreement was effective from August 2006 through July 1, 2009, and the last and most recent agreement became effective on July 1, 2009 (2009 Agreement). (Jt. Exhs. 1-4.)

[8] These payments were included in either the first or second pay checks issued in June and December of each year from 2001 through June 2012. (Tr. 96-97.)

tinue to receive a raise during a time when Respondent had placed caps on annual hourly wage increases at 10 years of service.[9] (Tr. 109-111.) Respondent asserted that this testimony be disregarded since Lizardi was not present during the 2001 contract negotiation meetings when the parties began to implement longevity pay language. (R Br.) However, Lizardi recalled that in 2001 union officials offered this explanation to union members when the 2001 Agreement was brought to them for a vote. He also remembered that this historical basis for longevity pay was discussed during subsequent union board meetings, of which he was a part. (Tr. 101-102, 109-111.) Lizardi was credible in his presentation, and Respondent did not present any evidence to dispute this explanation. However, I credit this testimony for historic background only, as it is not material or critical in the determination of liability in this case. Neither Lizardi nor Ryals offered an explanation for maintaining this benefit, nor do I find one is necessary. Lizardi acknowledged, and there is no dispute, that after Respondent removed the caps on hourly wage increases[10] the parties agreed and continued to include longevity pay articles in successor agreements. (Jt.

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[9] While Lizardi recalled a pay scale in 2001, when the Longevity Pay article was implemented, that "topped out" at 10 years, the collective-bargaining agreements effective from 2001 to 2003 and 2003 to 2006 reveal that annual wage increases were actually capped at 11 years for all Emergency Medical Technicians and Registered nurses, and at 13 years for Paramedics (i.e., caps were dependent upon employees' job classifications). (Jt. Exh. 1 pp. 50-52; Jt. Exh. 2, p. 51 and appendix A.)

[10] See fn. 8, above.

Exhs. 3, pp. 31-32; 4, p. 53.) Thus, I find there is a long- standing history and practice, no matter what the reason or origin, for Respondent and the Union to agree to longevity pay provisions.

While the parties sharply disagree as to whether Respondent had an on-going obligation to issue longevity pay after the expiration of the 2009 Agreement, neither Lizardi nor Ryals recalled any discussions among the Respondent-Union 2009 negotiations team members as to this obligation. (Tr. 109, 170.)

During the trial, the parities disagreed as to whether the longevity pay was a "payment" or "bonus." Respondent made a point of referring to the payments at issue during the trial as "longevity bonuses," and in its answer as "longevity bonuses" and "longevity bonus payments." inferring a distinction between "pay" and "bonus." (GC Exhs. 1(e); Jt. Exhs. 1-4.) However, Respondent did not proffer any arguments to support such a distinction. Nor did it specifically argue that longevity pay was not a mandatory subject of bargaining. Respondent did assert that these payments were separate, stand-alone events, and not an ongoing practice, and did not affect regular wages or otherwise impact future terms and conditions. (R Br., pp. 7-8.) Both parties repeatedly included articles entitled "Longevity Pay" in their successive collective-bargaining agreements implemented from 2001 through 2012. (Jt. Exhs. 1-4.) When asked to describe "longevity pay" or "longevity bonus," Ryals responded that "[i]t is a payment that's made to employees that have achieved ten-plus years of service." (Tr. 121.) He also repeatedly identified the payment as "longevity pay" during his testimony,

even when questioned by Respondent's attorney. (Tr. 57, 150, 163, 166-167.) It matters little to the ultimate question in this case what the parties chose to call the longevity payments. While these payments may not have been a part of regular wages or overtime pay, I find the parties agreed that they be paid to more senior employees as a type of enhancement or addition to regular wages.

2. Article 44 of the 2009 Agreement

The most recent collective-bargaining agreement became effective July 1, 2009, and remained in effect until July 1, 2012. (Jt. Exh. 4.) The "Longevity Pay" provision of the 2009 Agreement in article 44, which is at issue in this case, provided in relevant part:

> 44.1 Every December 1st and June 1st of each year of this Agreement, employees who have completed at least ten years of full-time service but less than 15 years of [full-time] service shall qualify for $100.00 for each year of continuous full-time service in excess of nine years.
>
> 44.2 Employees that have completed 15 or more years of full-time service shall receive $150.00 for each year of continuous [full-time] service in excess of nine years, up to a semi-annual maximum of $3,000.00 and an annual maximum of $6,000.00.
>
> 44.3 Employees on industrial leave shall qualify for this payment for only the first six (6) months of industrial leave.
>
> 44.4 Payments will be made to employees who are active as of the date payment is made. Payments

will be paid no longer than 30 days after the qualifying date.

44.5 An employee must be in good standing as of the qualifying date to receive longevity pay. Good standing shall be defined as not currently on probation for prior actions, being in compliance with attendance and timeliness policies, and maintaining acceptable documentation performance during the prior six (6) month period.

(Jt. Exh. 4, p. 61 of 62.)

3. Other relevant provisions of the 2009 Agreement[11]

Article 3, entitled "Duration of Agreement," Section 3.1 provided, in relevant part: "[t]his Agreement shall be considered effective July 1st, 2009 and shall remain in effect until July 1, 2012." The cover page of the 2009 Agreement contains the following: "Effective Dates: July 1st, 2009-July 1st, 2012." (Jt. Exh. 4, p. 6 of 62; p. 1 of 62.)

Article 36—"Hourly Pay," Section 3.1 of this Agreement provided in relevant part:

36.1 Beginning with the first full pay period following the signing of this labor agreement, each active/current employee covered under this agree-

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[11] Respondent cited to or referenced these other provisions to support its theories that the Union either agreed to a set number (six) of longevity payments during the specific term of the 2009-2012 Agreement, waiving its right to bargain, or waived its right to bargain by failing to file a grievance or unfair labor practices (ULP) charge when Respondent discontinued pay increases under art. 36 of the 2009 Agreement. These theories will be discussed in the Discussion and Analysis sections of this decision. (R. Br.)

ment will receive a 4% increase including retroactive pay for hours worked since July 1, 2009. This retro payment will be based on only hours worked in a position covered in this labor agreement.

36.2 Beginning with the first full pay period in July 2010, each employee covered under this agreement will receive a 2.5% increase.

36.3 Beginning with the first full pay period in July 2011, each employee covered under this agreement will receive a 3.5 % increase.

(Jt. Exh. 4, p. 53 of 62.)

4. Expiration of 2009 Agreement and discontinuance of longevity pay

The 2009 Agreement expired on September 8, 2012. It initially expired on July 1, 2012, pursuant to the effective dates in the agreement, but the parties entered into three consecutive, temporary agreements to extend the 2009 Agreement through September 8, 2012. (Jt. Exh. 4, p. 6 and Jt. Exhs. 5-7.) However, the parties began negotiations for a successor agreement in about March 2012, and in fact, continue to meet and negotiate for a new agreement. (Tr. 54-55, 92-93; GC Exh. 2.) The parties agree to the most material facts following the expiration of the 2009 Agreement. They agree that Respondent made the last longevity payment to eligible unit employees in June 2012, and refused to continue to make these payments in December 2012 and thereafter. Respondent, through COO Ryals' testimony and stipulations, admits that it did not provide the Union with notice or an opportunity to bargain prior to the decision to discon-

tinue longevity payments.[12] In fact, Ryals did not "believe there was any need for [Respondent] to notify them." He asserted that "[t]he plain language of the CBA that was expired, there was no continuing process that I would notify them about." (Tr. 59-60; 166; Jt. Exh. 8.)

Although questioned at length as to who made the decision to discontinue longevity pay, and with whom he discussed the decision, it is evident from Ryals' undisputed, unwavering testimony that he made the decision to terminate longevity pay after the 2009 Agreement expired, and that Respondent sanctioned this decision. (Tr. 56-60.) Ryals did not, however, inform the Union of his decision until December 3, 2012, when Lizardi contacted Respondent's payroll manager, Cassandra Collins,[13] via email, to ask if the "longevity checks would be in the next check or the one after[.]" Collins initially responded "[t]he one after," but 13 minutes later, emailed the following: "Sorry, but from what I understand we won't be paying any longevity yet." She then clarified that "the company is not planning on paying longevity." Lizardi forwarded these emails to the Union Treasurer, Kevin Burkhart. (GC Exh. 4.) Kevin Burkhart

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[12] The parties also stipulated had Respondent issued longevity pay pursuant to the formula set forth in the 2009 Agreement, payment would have totaled $87,150 to 138 bargaining unit employees. (Jt. Exh. 8.)

[13] Collins normally administered the actual payments as directed by Respondent. She did not make decisions as to whether or not payments would be issued. (Tr. 73-77.)

subsequently asked Ryals "to do the right thing,"[14] and issue the longevity pay, but Ryals denied the request. (Tr. 57, 60; Jt. Exh. 8.)

> I credit Lizardi's undisputed testimony that he and one or more of his other Union officials contacted Respondent almost immediately after he received word from Collins that the longevity benefit would not be paid. They inquired as to the reason why it was not paid. As previously stated, Respondent admits that it refused to honor this request or give the Union an opportunity to bargain over its decision not to make longevity payments.

Ryals recalled that he verbally communicated his decision to stop longevity pay to his managers and other company executives, and that no one disagreed. (Tr. 57, 139-140.) The only email produced regarding written communication to other managers/officials was dated September 11, 2012, and entitled "Local I-60 Negotiations Update." While it confirmed that the parties were still working together to negotiate a new agreement after the 2009 contract expired, it did not mention longevity pay, or other specific provisions in the 2009 Agreement. It did state in pertinent part:

> Managers:
>
> By now you have all heard that the contract with Local I-60 has expired and the company did not extend the contract. This is true.

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[14] Ryals did not specifically recall this conversation with Burkhart, but admitted that "Kevin says things like that, it wouldn't be out of character for him." (Tr. 60.)

[W]e agreed to begin negotiations in March, well before the June expiration date of the existing contract.

. . . .

Much to the Company's surprise, during our first negotiation session on March 27th, the Union announced that they wanted to completely scrap all articles in the existing contract, which took literally hundreds of hours to negotiate over the years, and start over.

The Company has negotiated in good faith and, as such, extended the existing contract twice. The Company did not feel that continued extension of the contract would result in any improvements in the negotiations process. Thus, the Company declined to take such action. Obviously the process is taking longer than anyone wants, but a lot of progress has been made. We are optimistic that we will be able to reach Agreement in a timely manner on the remaining outstanding articles.

Now what does this all mean to you and how you manage your direct reports? The answer is, pretty much nothing.

Wages benefits and working conditions remain unchanged. The disciplinary process remains unchanged. The disciplinary process remains unchanged at your level. All policies, procedures, and standard operating procedures remain unchanged.

In other words, it is business as usual

> While there are a few changes that the Law allows, like the ability of the Union to Strike and the ability of the Company to Lock Out the workforce, no one is even contemplating strikes or lockouts that I am aware of. Again, your responsibility is to perform business as usual.[15]

(GC Exh. 2; Tr. 150-151.)

In August 2012, prior to the expiration of the 2009 Agreement, the parties reached a tentative agreement (TA)[16] to retain a longevity pay provision in the new or successor agreement that would remain identical to the in article 44 of the 2009 Agreement. (Tr. 55-56; 95-97.)

Ryals testified that he drafted the longevity language in the collective-bargaining agreements from 2001 through 2009. (Tr. 123, 124.) He explained that his understanding of what Respondent committed to in art. 44 of the 2009 Agreement was that "longevity pay would be paid out on the two dates specified, which were . . . July and December of each year that the

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[15] It appears from this correspondence to managers, that Ryals may not have made his decision to discontinue longevity payments as of September 11, 2012 (3 days after the expiration of the Agreement). His testimony indicates that he probably made his decision in November 2012 or before the time that longevity pay historically being paid out to someone. (Tr. 57.)

[16] Both Ryals and Lizardi explained that a TA occurs when both negotiating parties to a new or successor agreement agree to the language of a particular provision, pending approval of a final collective-bargaining agreement. (Tr. 55-56; 95-97.)

agreement [went] into effect. When the agreement was no longer in effect, the company had no obligation, and nor would [he] believe the plain language indicates that payment [would continue]." He asserted that the Company believed it was agreeing to only "a total of six payouts for longevity," and those were the only payments made throughout the course of the 2009-2012 Agreement. (Tr. 165-166.) Clearly, the Union has a different understanding as to what would occur after the expiration of the 2009 Agreement. I find that this is a legal dispute rather than a factual one, and that the 2009 Agreement was silent as to what would happen to the longevity provision in the event it expired. Respondent refused to stipulate that the parties had not discussed with each other their post-expiration expectations for the 2009 Agreement, either during negotiating sessions or otherwise, leading up to the 2009 contract. However, it is uncontested that neither Lizardi nor Ryals could recall any discussions among the parties' negotiating team members regarding what would happen to the biannual longevity payments if the 2009 Agreement expired without a successor agreement in place.[17] (Tr. 109-110, 170.) Thus,

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[17] There was a lot of trial discussion as to whether or not Ryals or Tuesday Kramer took and kept bargaining session notes regarding longevity pay discussions. Ryals asserted that he nor Kramer had any such notes. On the other hand, Lizardi observed that in most meetings, Kramer appeared to be taking notes on her laptop, but he could not recall if she took notes during longevity pay discussions. (Tr. 94-95.) I tend to credit Lizardi's observations over Ryals' rather unequivocal, vague testimony that "[s]he's been there, she takes notes some of the time [s]ome of the time, she does not." (Tr. 48.) Since Kramer was not called by either party to settle this dispute, and neither Ryals nor Lizardi could

I find the parties did not discuss or come to an agreement, nor include in any agreement, what would occur to longevity pay once the 2009 Agreement expired.

III. DISCUSSION AND ANALYSIS

Legal Standards

1. Threshold issue is whether a determination of the merits should be deferred to a Grievance and Arbitration Process

I will first address Respondent's assertion that it may be appropriate to defer my decision in this case to an arbitrator pursuant to the 2009 Agreement's grievance and arbitration procedures. Respondent relies on the holding in *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977). (Tr. 22; GC Exh. 1(e); Jt. Exh. 4, pp. 37-41.)[18] Respondent asserted, at the trial and in its answer, that if the Agency alleges that it violated the collective-bargaining agreement, then any right that arises under the contract is arbitral, regardless of whether the contract has expired. (Tr. 22). As the Agency pointed out in its brief,[19] the Board has long recognized the appropriateness of deferring certain unfair labor practice charges in cas-

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recall specific discussions about longevity pay, other than in sessions for the new contract, this matter is not relevant or critical to the decision in this case.

[18] In its answer, and at trial, Respondent asserted this deferral argument as an affirmative defense, but did not address it in its brief. (R. Br.) However, since Respondent has not officially abandoned this affirmative defense, it is appropriate to address it as a threshold issue before deciding the merits of the unfair labor practice issue.

[19] R. Br. pp. 11-12.

es where a union and employer have active grievance and arbitration procedures in place. See *University Moving & Storage Co.*, 350 NLRB 6, 20 (2007), citing *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984) (the Board reaffirmed and bolstered its doctrine in *Collyer Insulated Wire*, supra).

Under *Collyer Insulated Wire*, supra, and *United Technologies Corp.*, supra at 558, deferral is appropriate when:

> [T]he dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity [or "enmity"] to the employees' exercise of protected rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution [by arbitration].

University Moving & Storage Co., supra at 20. In the instant case, the parties had a long and productive collective-bargaining relationship, with no claim of employer animosity, as evidenced by the successive agreements and on-going negotiating towards a new agreement. However, this case does not pass the *Collyer Insulated Wire* test, in that the 2009 Agreement does not encompass the dispute at issue. In fact, as discussed further here, the 2009 Agreement specifically stated that the arbitration clause would not survive the Agreement.

In *Nolde Bros., Inc. v. Bakery Workers Local 358*, 43, supra at 243, the Supreme Court held that when the parties have agreed to arbitrate grievances arising under a collective-bargaining contract, that obligation is presumed to continue once the contract has expired. In a subsequent case, the Supreme Court clarified its holding in *Nolde Bros., Inc.*, supra, stating that "*Nolde Bros., Inc.*, supra, 430 U.S. at 255 . . found a presumption in favor of postexpiration arbitration of disputes unless negated expressly or by clear implication so long as such disputes arose out of the relation governed by the contract." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 191-192 (1991).

The facts in *Nolde Bros., Inc.*, are easily distinguished from this case. First, the case involved a suit to compel arbitration under the arbitration provisions of an expired collective-bargaining agreement, which, unlike the arbitration in the instant case, was silent regarding postexpiration grievances or arbitration. The union alleged the employer was obligated to arbitrate its refusal to provide severance pay, under the expired agreement, to displaced employees who had worked for the company for at least 3 years. The employer argued that its obligation to arbitrate (and pay the displaced employees) died with the contract because the event leading to displacement and giving rise to the dispute—the closing of the plant—occurred after the expiration of the contract. The Court held that "[t]he dispute . . . although arising after the expiration of the collective-bargaining contract, clearly arises under that contract." *Nolde Bros.*, supra at 249. The Court observed that parties had agreed in

the expired contract's arbitration clause to attempt to resolve "all grievances," but that the contract was silent as to postexpiration grievances. It held that "in the absence of some contrary indication, there are strong reasons to conclude the parties did not intend their arbitration duties to terminate automatically with the contract." *Nolde Bros.*, at 253. The Court concluded "[i]n short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." *Nolde Bros.*, supra at 255.

In *S & W Motor Lines*, 236 NLRB 938 (1978), the Board adopted the position that the arbitration provision did not survive contract expiration because the *Nolde* presumption favoring arbitrability of postexpiration disputes had been negated by express language in the contract. Unlike the contract in *Nolde*, but like the contract in *S & W Motor Lines*, supra, the expired 2009 Agreement in this case explicitly states that the parties' grievance and arbitration procedure "does not survive the term of this Agreement." (Jt. Exh. 4, p. 37.)[20] Therefore, I find no basis upon which to defer the merits of this case to arbitration where the parties clearly decided that arbitration would not survive the

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[20] The Board has consistently recognized that the parties generally do not have an obligation to adhere to the terms of an expired arbitration agreement. See *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57 (1987) (the Board reaffirmed its view that "the arbitration commitment arises solely from mutual consent. Congress did not intend the [NLRA] to create a statutory duty to arbitrate," and recognized deferral of charge to be inappropriate where grievances were triggered by events occurring after the expiration of contacts").

contract. Furthermore, the parties to this expired 2009 Agreement "have no contractual obligation to adhere to the agreement's arbitration procedure in processing grievances arising after the agreement's arbitration date." See *W. H. Froh, Inc.*, 310 NLRB 384, 386 (1993), citing *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57 (1987), and *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970).[21]

2. Discontinuance of longevity pay after expiration of the 2009 Agreement

Mandatory Subject of Bargaining

First, I find that longevity pay, as described in article 44 of the 2009 Agreement, as well as the three predecessor agreements, is clearly a mandatory subject of bargaining.[22] The Board has recognized longevity pay as a mandatory subject of bargaining. In *Pine Brook Care Center*, 322 NLRB 740, 748 (1996), the Board adopted the Administrative Law Judge's findings which including a finding that certain bene-

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[21] The Board in *W. H. Froh, Inc.*, supra at 386 fn. 5, noted that *Hilton-Davis* has been cited with approval by the Supreme Court in *Litton Financial Printing Div. v. NLRB.*, 501 U.S. 190 (1991).

[22] While Respondent does not assert that longevity pay is not a mandatory subject of bargaining, at trial, it insisted on characterizing longevity pay as a "longevity bonus" or "bonus," rather than agreeing that it is the same as "longevity pay." However, as I found earlier in this decision, art. 44, drafted by Ryals, and approved by the Union, is entitled "Longevity Pay," and both parties have certainly referred to benefit as a "bonus" or "pay" interchangeably throughout these proceedings. Nevertheless, no matter what they call it, it is clearly an economic benefit flowing from the relationship between the employer and unit employees, and a mandatory subject of bargaining as discussed here.

fits, including "longevity pay," constituted terms and conditions of employment which were "clearly" mandatory subjects of bargaining. Additionally, whether described as a "longevity bonus" of "longevity pay," I find article 44 describes a payment to eligible senior employees which constitutes a mandatory subject of bargaining.

Unilateral Change Violation

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees;" and has culminated into a longstanding rule that an employer violates Section 8(a)(5) if it "unilateral[ly] change[s] conditions of employment under negotiation, for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Furthermore, it is well settled that the unilateral change doctrine set forth in *NLRB v. Katz*, supra, whereby an employer violates the NLRA if it effects a unilateral change of an existing term or condition of employment, without bargaining to impasse, extends to cases in which an existing agreement has expired and negotiations on a new one are pending. See, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988), *Litton Financial Printing Div. v. NLRB.*, supra, 191-192. Therefore, an employer's duty to maintain the status quo remains the same, during negotiations, when both the Union and employer have agreed to a particular term or condition of employment in a collective-bargaining agreement which has ex-

pired. *Finley Hospital*, 359 NLRB No. 9, slip op. at 2 (2012), citing *Litton*, supra at 198; *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra.

An employer may escape liability for a unilateral change violation if it proves that a union has expressed or implied a "clear and unmistakable waiver" of its right to bargain. *American Broadcasting Co.*, 290 NLRB 86, 88 (1988); *California Pacific Medical Center*, 337 NLRB 910 (2002).

The Board has relied on several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman*, 295 NLRB 180, 184-187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver, however, bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Respondent, from the offset, does not raise the customary defense that the Union waived its right to bargain. Rather, Respondent asserts that the waiver doctrine is irrelevant in this case because it never changed existing terms and conditions of employment. In fact, Respondent even argues that "longevity bonuses" were not an ongoing practice, "but were limited by both parties in the 2009 Agreement to a fixed number of payments (six) on specified dates which "expired

of [their] own accord" once they were made.[21] Respondent contends that this calculated expiration did not constitute a "change," nor create an obligation to bargain, because Respondent made all longevity payments required by the expired 2009 Agreement. Respondent does argue, alternatively, that if I apply the "clear and unmistakable waiver" doctrine, Respondent's obligation would be satisfied much for the same reasons, i.e., that it met its obligation once the sixth payment was made. Respondent also avers, alternatively, that the Union implicitly waived its right to bargain when it failed to grieve or file a charge in connection to Respondent's termination of wage increases under Article 36 of the 2009 Agreement. It relies heavily its interpretation of Union President Adam Lizardi's testimony. (R Br.)

First, I have considered all of Respondent's arguments as to why its actions did not constitute a "change" or "unilateral change," and find they are unsupported by the case law and merits. Pursuant to *Katz*, supra, and its progeny cited here, Respondent effected a unilateral change of an existing term or condition of employment, without bargaining to impasse. This rule, as set forth above, has been ex-

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[21] Respondent made the last longevity payment in June 2009, prior to the expiration date of the longevity agreement. I must reject, however, this questionable assertion that longevity payments were not an ongoing practice. This belies the undisputed evidence that Respondent and the Union have in fact continued the practice of including longevity pay provisions in its collective-bargaining agreements since 2001. Furthermore, there is no language in the 2009 Agreement to even infer that issuance of biannual longevity payments was a one-time or occasional practice.

tended to cases such as the instant case, in which an existing agreement has expired and negotiations on a new one are pending. See, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra at 544, n.6 (1988); *Litton Financial Printing Div. v. NLRB*, supra at 191-192. There is simply no dispute in this case that Respondent changed a term and condition of employment pending negotiations for a new contract.

Next, I find there is clearly no express waiver encompassed in the 2009 Agreement, and reject Respondent's assertion that the language in the Longevity Pay article 44, i.e., "Every December 1st and June 1st of each year of this Agreement," coupled with effective dates of the contract, represents the Union's express or implied waiver, much less a "clear and unmistakable" waiver of its bargaining rights. The Board rejected similar language in *Finley Hospital*, supra at 1, in which it found the respondent violated Section 8(a)(5) of the Act by unilaterally discontinuing the annual 3-percent pay raises provided in the parties collective-bargaining agreement upon expiration of the agreement. The Board applied the "clear and unmistakable waiver" standard in that case, requiring parties to "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Finley Hospital*, supra at 2, citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-812 (2007).

The respondent in *Finley Hospital*, as in this case, relied on the multiple references, in the collective-bargaining agreement provision at issue, to the term of the agreement, i.e., "During Term of the Agreement," "For the duration of this Agreement," and "during the term of this Agreement." The Board found that while such references might limit the contractual obligation and right for any period after the contract expiration, "these references fail to 'unequivocally and specifically express [the parties'] mutual intention to permit unilateral employer action with respect to the [annual wage increases]." The Board recognized that neither the wage increase provision, nor the agreement as a whole, provided for any postexpiration action or conduct, much less expressly permit[ted] unilateral employer action" upon the expiration of the agreement. *Finley Hospital*, supra at 3, citing *Provena*, supra at 811.

Prior to Finley Hospital, the Board consistently reached this same result its cases involving postexpiration changes in terms and conditions established by an expired agreement. See *AlliedSignal Aerospace*, 330 NLRB 1216, 1216-1222 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) ("[w]hatever the scope of the [r]espondent's obligation as a matter of contract, there is no basis for finding the [u]nion waived its [statutory] right to continuance of the status quo as to terms and conditions . . . after contract expiration); *General Tire & Rubber Co.*, 274 NLRB 591, 592-593 (1985), enfd. 795 F.2d 585 (6th Cir. 1986) (Board found the contract did not address employer's statutory obligation to pay benefits postexpiration of a contractual

benefit continuation period, and therefore did not constitute a waiver of the union's rights). The Board in this case distinguished *Finley Hospital* from Board decisions which found a "clear and unmistakable," because the contracts in those cases included postexpiration language. See *Cauthorne Trucking*, 256 NLRB 721 (1981), granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982); *Oak Harbor Freight Lines*, 358 NLRB No. 41 (2012).

The contract language in the instant case, like that in *Finley Hospital*[24], and the other Board cases cited there, *AlliedSignal* and *General Tire*, sets limits on the effective periods of the contractual obligation, but fails to provide for the employer's postexpiration conduct or obligation or authorize unilateral changes by the employer. Respondent contends *Finley Hospital* is factually apposite from this case because the longevity payments provided in this case's 2009 Agreement were "separate, stand-alone [events] timed to occur on specific dates, and were not ongoing [practice] like the wage increases in *Finley Hospital*." This argument is completely unsupported by the evi-

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[24] I have considered, and dismiss, Respondent's argument that Finley Hospital should not be considered by me because it was decided by an improperly constituted Board, citing *Noel Canning v. NLRB*, supra, and *New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3d Cir. 2013). As decided earlier on in this decision, I find this argument is without merit, as the Board is not bound by these decisions. It has rejected this argument, as the issue regarding the validity of recess appointments is pending litigation and "definitive resolution." I note, as well, that the Board in Finley did not make decisions of first impression, but relied on well-settled Board and Court decisions.

dence, as discussed earlier. The longevity payments in the instant case were not "stand-alone" or "separate" events. Rather, they were consistent payments issued biannually in several successive agreements between Respondent and the Union from 2001 through 2012. In fact, while not at issue here, the parties admitted they agreed to a tentative agreement (TA) to continue to maintain the longevity payments in a successor agreement. Therefore, I find the employer in this case has not shown a clear and unmistakable waiver, of any kind, of its obligation to maintain the status quo created in the expired 2009 Agreement, and has therefore violated Section 8(a)(5) and (1) of the Act.

Respondent also argues that *Finley Hospital* is based on reasoning that has been rejected by the D.C. Circuit, and therefore should not be treated as binding or persuasive "in any sense." See *NLRB v. USPS*, 8 F.3d 832, 838 (D.C. Cir. 1993); *Enloe Medical Ctr. v. NLRB*, 433 F.3d 834, 837 (D.C. Cir. 2005). (R Br., p. 7, fn. 2.) The D.C. Circuit Court of Appeals rejected the Board's "clear and unmistakable" waiver doctrine in those cases, implementing instead, its own "waiver" vs. "covered by" doctrine.[25] While the Board is not

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[25] Held that "questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement," citing *NLRB v. USPS*, supra at 836-837. Instead, the proper inquiry is "simply whether the subject that is the focus of the dispute is 'covered by' the agreement." Id at 836. Also see *Dept. of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992). Unlike the subject matter in dispute in the D.C. Circuit Court of Appeals cases cited here, I find termination of longevity pay and the refusal

bound by the findings in these cases, as evidenced in its findings in *Finley Hospital*, I find that even applying the D.C. Court of Appeals doctrine here, Respondent's argument is without merit, and my decision remains the same. The Court of Appeals found in both cases that the companies' actions, including implementation of changes and refusal to bargain over the effects of those changes, were sanctioned by agreed-upon, existing collective-bargaining agreements. See *NLRB v. USPS*, supra at 834, 837; *Enloe Medical Ctr.*, supra at 837. The instant case is distinguishable in that the 2009 Agreement was not an existing agreement, and the 2009 Agreement's Management Rights clause or other provisions did not so authorize or "sanction" Respondent to discontinue longevity pay, and refuse to bargain. (Jt. Exh. 4, pp. 8-9 of 62.) Thus, the D.C. Circuit Court's waiver approach is not inapposite to this case, and I still find the Union in the instant case did not waive its bargaining rights.

Likewise, I reject the notion that the Union implicitly waived its right to bargain over the termination of longevity pay because it did not challenge, but rather, accepted limitations on hourly wage increases in Article 36 of the agreement. Article 36 of the 2009 Agreement provides for annual percentage increases in hourly pay beginning with the first full pay period following the signing of the agreement, and thereafter, beginning with the first full pay period in July 2010 and July 2011, for each "active/current employee cov-

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to bargain over the same was not "covered by" the 2009 Agreement.

ered under this agreement." Lizardi acknowledged that the Union did not take issue with this provision since it set forth specific dates and years for the increases and termination thereof. I agree, and so find, that the language in this provision is distinguishable from Article 44, in that it specifically terminated hourly wage increases 1 year before the contract ended. Notwithstanding my finding, the Board has rejected "waiver-by-inaction defense, finding the Union must have clear notice of the employer's intent to institute a change. *Rappazzo Elec. Co.*, 281 NLRB 471, 482 (1986).

I therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity pay without first having afforded the Union notice and an opportunity to bargain. I further conclude that Respondent violated Section 8(a)(1) of the Act by notifying the Union, after the fact, of its decision that it would not be issuing longevity pay.

CONCLUSIONS OF LAW

1. SW General, Inc. d/b/a Southwest Ambulance (the Company) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its facility in Mesa, Arizona.

3. On or about December 1, 2012, and thereafter, the Company violated Section 8(a)(5) of the Act by failing to give notice and an opportunity to bargain with the Union prior to unilaterally terminating longevity payments for all eligible unit employees after the most recent expiration of the 2009 collective-bargaining agreement on September 8, 2012.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully and unilaterally terminated longevity payments, and failed to distribute them to eligible unit employees as required by the parties' July 1, 2009, through July 1, 2012 contract, as extended to September 8, 2012, I shall order it to make whole for any loss of earnings or benefits suffered as a result of said unilateral change. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award award(s)

covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No.44 (2012).

On these findings of fact and conclusions of law, and on the entire record here, I issue the following recommended[25]

ORDER

The Company, SW General, Inc. d/b/a Southwest Ambulance, in Mesa, Arizona, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Unilaterally terminating unit employees' longevity pay benefits without first notifying the Union and affording it an opportunity to bargain concerning such change and its effects.

(b) In any like or related manner interfering with, restraining, or coercing Employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral material change to longevity pay implemented in December 2012, as it relates to discontinuing longevity payments every June 1st and December 1st of every year and maintain those terms, as set forth in the most recent collective-bargaining agreement between Respondent and the

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[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Union effective from July 1, 2009, through July 1, 2012, and extended by further agreements until September 8, 2012, and maintain those terms in effect until the parties have bargained and agreed to material changes and/or until the parties have agreed upon and implemented a new collective-bargaining agreement, or until Respondent has bargained to a good-faith impasse with the Union regarding longevity pay.

(b) Make any unit employees and former unit employees whole by reimbursing them for longevity pay, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), for any loss of benefits suffered as a result of the unilateral implemented changes to longevity pay.

(c) Within 14 days after service by the Region, post at its Mesa, Arizona facility, and Respondent's Southwest Emergency Medical Services Group's facilities, if any, in Maricopa, Pinal, Pima and Graham Counties, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

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[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 1, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated at Washington, D.C. Aug. 8, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement material, substantial, and significant changes to our employees' longevity pay without providing the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL rescind the unilateral material change to discontinue longevity pay implemented in December 2012, as it relates to elimination of biannual longevity pay to eligible unit employees consistent with article 44 of the collective-bargaining agreement, effective from July 1, 2009, through July 1, 2012, and extended through September 8, 2012, for all affected bargaining unit employees and former unit employees.

WE WILL, if requested by the Union, bargain in good faith over any material change in the eligibility of employees or former employees with 10 or more years of full-time service with Respondent as of December 1, 2012, and thereafter, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole, with interest, any current or former unit employee affected by the termination of longevity pay as of December 1, 2012, and thereafter, for any loss of earnings and other benefits suffered as a result of the unlawful unilateral change made to longevity pay.

SW GENERAL, INC. D/B/A SOUTHWEST AMBULANCE

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 28-CA-094176
JD(ATL)-20-13
Mesa, Az

SW GENERAL, INC., D/B/A SOUTHWEST AMBULANCE AND
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
LOCAL I-60, AFL-CIO

Aug. 8, 2013

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Phoenix, Arizona, on April 23, 2013. The Charging Party Union, International Association of Fire Fighters, Local Union I-60, AFL-CIO (the Union) filed the charge in this case on December 3, 2012, and the Acting General Counsel (AGC) issued the complaint on January 31, 2013. (GC Exh. 1(a) and 1(c)[1] The complaint alleges that Southwest General, Inc., d/b/a Southwest

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[1] Exhibits received into evidence are referred to here as "GC Exh." For General Counsel Exhibit; "R Exh." For Respondent Exhibit; and "Jt. Exh." For Joint Exhibit). The parties' briefs will be referred to here as "GC Br." for General Counsel's brief, and "R Br." for Respondent's brief.

Ambulance (Respondent) violated Sections 8(a)(5) and (1) of the Act when it made a unilateral change in working conditions without having afforded the Union notice, and an opportunity to bargain. More specifically, the complaint alleges that upon expiration of the most recent collective-bargaining agreement, from 2009-2012 (the 2009 Agreement) (Jt. Ex. 4), Respondent unilaterally discontinued biannual longevity payments to unit employees, pursuant to said agreement. Respondent denied, in its answer,[2] that it had any obligation to continue longevity payments once the 2009 Agreement expired, and denied any other unlawful conduct alleged in the complaint. The Respondent asserted several affirmative defenses, including that any contractual dispute that exists should be deferred to an arbitrator, and not interpreted by the Board. (GC Exh. 1(e); Tr. 222-223).[3]

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[2] During the trial, Respondent amended its answer to admit to pars. 5(a) and 5(b) of the complaint. (Tr. 89).

[3] Respondent also asserted, as an affirmative defense, that the complaint must be dismissed because the President's purported appointments of two new Board members were unconstitutional and invalid. Respondent argued that the Board lacks a quorum since the expiration of member Becker's term on January 3, 2012 (citing *New Process Steel v. NLRB*, 1380 S. Ct. 2635, 2640 (2010) (held "two [remaining Board] members may [not] continue to exercise that delegated authority once the group's (and the Board's) membership falls to two." (GC Exh. 1(e)). This argument lacks merit here, however, as the Board rejects any ruling that it does not have the requisite three-board member authority. I am aware that the United States Court of Appeals, D.C. Circuit, in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), concluded that the President's recent recess appointments to the Board were not valid. However, as noted by that Court, this conclusion is in conflict with at least three other courts of appeals' rulings. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert denied 544 U.S.

After the trial, the Acting General Counsel and the Respondent filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of witnesses, and my observation of their demeanor, I make the following

FINDINGS INDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Mesa, Arizona (Respondent's facility), provides emergency and nonemergency ambulance services throughout the State of Arizona by contracting with hospitals, nursing homes, municipalities, counties and other local government entities (Tr. 119, 120-121). During a representative 1-year period, ending December 3, 2012, Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan. During that same representative period, Respondent received gross revenues in excess of $250,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties admit, and I also find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). Thus, the Board has rejected this argument, as the issue regarding the validity of recess appointments "remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." See *G4S Regulated Security Solutions*, 359 NLRB No. 101, slip op. at 1, fn.1 (2013), citing *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn.1 (2013).

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent Southwest Ambulance contracts with municipalities and other government entities, including unincorporated areas of counties within the State of Arizona to provide emergency 911 ambulance services. It also provides critical care and convalescent facility ambulance transportation services between hospitals, and between hospitals and nursing homes and vice versa. Id.

Respondent has admitted, and I find, that since 1992 (Jt. Exhs. 1(e) and 1(c), and at all relevant time periods here, Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has also been embodied in successive collective-bargaining agreements, including the most recent 2009 Agreement. (GC Exhs. 1(e), p. 2 and 1(c), p. 2; Jt. Exhs. 1-4; Tr. 121). The employees of the respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and include:

> . . . all full-time and regular part-time EMT, EMT-I, Paramedics and Registered Nurses, but excluding any on-call part-time employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

(Jt. Exhs. 4; GC Ex. 1(e)).[4] The unit currently includes approximately 800 employees (Tr. 88, 121), of Respondent's Southwest Emergency Medical Services Group's Maricopa, Pinal, Pima and Graham County nonfire inte-

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[4] EMT- Emergency Medical Technician.

grated ambulance operations. (GC Exh. 1(e); Jt. Exh. 4, p. 4).

Respondent's Chief Operating Officer (COO), Roy Ryals, is responsible for most of Southwest Ambulance's operations, including management-union negotiations and contract administration and internal adjudication of grievances and labor disputes. (Tr. 120). He has participated in collective-bargaining negotiations between Respondent and the Union, as the lead negotiator or conegotiator, since at least the late 1990's or early 2000's, as well as the drafter of 2009 Agreement at issue here. (Tr. 121-124). John Karolzak, employed by Respondent's parent company, Rural/Metro Corporation, is Respondent's Southwest Zone Vice-President. Tuesday Kramer is the Human Resource Manager and Cassandra Collins is the Payroll Manager. Roy Ryals and Cassandra Collins testified during the trial, but Karolzak and Kramer were not called as witnesses..[5]

The current Union President is Adam Lizardi,[6] who has held that position since January 2012. Prior to that, he was the Union's business manager for several years., serving on the Union's contract negotiations team since about 2006. Other union officers with whom Lizardi works on his negotiations team are Kevin Burkhart, Treasurer, P J Elias, Vice President, Eddy Dobiecki and

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[5] Respondent initially denied in its answer that Ryals and Collins were supervisors, but amended its answer during the trial to admit they were supervisors and agents of Respondent. (GC Exh. 1(e); Jt. Exh. 8; Tr. 32).

[6] Lizardi is also an Emergency Medical Technician, with just over 19 years of service with Southwest Ambulance/Respondent. (Tr. 90).

Michael Lovett, Business Managers (Tr. 91-92, 101). Only Lizardi testified at the hearing.

Longevity Pay

1. History

Respondent and the Union first reached an agreement on language concerning longevity pay during negotiations of their 2001 collective-bargaining agreement. This language was set forth in Article 45 of that agreement, entitled "Longevity Pay;" and referred to biannual payments for long-term employees after they reached a qualifying threshold of service with Respondent. Respondent and the Union continued to include a "Longevity Pay" article in successive collective-bargaining agreements from June 2003 through September 2009[7] (Jt. Exhs. 1-4), without any lapses in agreements between May 2001 through September 2012. (Tr. 102). In fact, the language contained in the ""Longevity Pay" articles remained virtually unchanged in these agreements, except for the 2003 Agreement, in which the parties agreed to add a separate tier of longevity pay for employees with 15 years or more seniority. (Id.).

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[7] The 2001 collective-bargaining agreement (2001 Agreement) was to remain in effect until 2004, but the parties entered into negotiations early and signed a new collective-bargaining agreement that became effective in June 2003 (2003 Agreement) through June 2006, keeping the "Longevity Pay" provision in Article 45. In the subsequent 2006 and 2009 Agreements, this provision was placed in Article 44. The 2006 Agreement was effective from August 2006 through July 1, 2009, and the last and most recent agreement became effective on July 1, 2009 (2009 Agreement). (Jt. Exhs 1-4).

The parties stipulated that pursuant to these collective-bargaining agreements, Respondent issued biannual longevity payments (in June and December)[8] to eligible unit employees from 2001 through June 2012, the month during which the most recent 2009 Agreement initially expired. (Jt. Exh. 8).

According to the current Union President, Adam Lizardi, the Union initially wanted the longevity pay provision to give senior employees an opportunity to continue to receive a raise during a time when Respondent had placed caps on annual hourly wage increases at 10 years of service.[9] (Tr. 109-111) Respondent asserted that this testimony be disregarded since Lizardi was not present during the 2001 contract negotiation meetings when the parties began to implement longevity pay language. (R Br.). However, Lizardi recalled that in 2001, union officials offered this explanation to union members when the 2001 Agreement was brought to them for a vote. He also remembered that this historical basis for longevity pay was discussed during subsequent union board meetings, of which he was a part. (Tr. 101-102, 109-111). Lizardi was credible in his presentation, and Respondent

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[8] These payments were included in either the first or second pay checks issued in June and December of each year from 2001 through June 2012. (Tr. 96-97).

[9] While Lizardi recalled a pay scale in 2001, when the Longevity Pay article was implemented, that "topped out" at 10 years, the collective-bargaining agreements effective from 2001 to 2003 and 2003 to 2006 reveal that annual wage increases were actually capped at 11 years for all Emergency Medical Technicians and Registered nurses, and at 13 years for Paramedics (i.e., caps were dependent upon employees' job classifications). (Jt. Exh. 1 pp. 50-52; Jt. Exh. 2, p. 51 and appendix A).

did not present any evidence to dispute this explanation. However, I credit this testimony for historic background only, as it is not material or critical in the determination of liability in this case. Neither Lizardi nor Ryals offered an explanation for maintaining this benefit, nor do I find one is necessary. Lizardi acknowledged, and there is no dispute, that after Respondent removed the caps on hourly wage increases[10] the parties agreed and continued to include longevity pay articles in successor agreements. (Jt. Exhs. 3, pp. 31-32; 4, p. 53). Thus, I find there is a long-standing history and practice, no matter what the reason or origin, for Respondent and the Union to agree to longevity pay provisions.

While the parties sharply disagree as to whether Respondent had an ongoing obligation to issue longevity pay after the expiration of the 2009 Agreement, neither Lizardi nor Ryals recalled any discussions among the Respondent-Union 2009 negotiations team members as to this obligation. (Tr. 109, 170)

During the trial, the parities disagreed as to whether the longevity pay was a "payment" or "bonus." Respondent made a point of referring to the payments at issue during the trial as "longevity bonuses," and in its answer as "longevity bonuses" and "longevity bonus payments." inferring a distinction between "pay" and "bonus." (GC Exhs. 1(e); Jt. Exhs. 1-4). However, Respondent did not proffer any arguments to support such a distinction. Nor did it specifically argue that longevity pay was not a mandatory subject of bargaining. Respondent did assert that these payments were separate, stand-alone events, and

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[10] See Footnote (FN) 8 above.

not an ongoing practice, and did not affect regular wages or otherwise impact future terms and conditions. (R Br., pp. 7-8). Both parties repeatedly included articles entitled "Longevity Pay" in their successive collective-bargaining agreements implemented from 2001 through 2012. (Jt. Exhs. 1-4). When asked to describe "longevity pay" or "longevity bonus," Ryals responded that "[i]t is a payment that's made to employees that have achieved ten-plus years of service . . . " (Tr. 121). He also repeatedly identified the payment as "longevity pay" during his testimony, even when questioned by Respondent's attorney. (Tr. 57, 150, 163, 166-167). It matters little to the ultimate question in this case what the parties chose to call the longevity payments. While these payments may not have been a part of regular wages or overtime pay, I find the parties agreed that they be paid to more senior employees as a type of enhancement or addition to regular wages.

2. Article 44 of the 2009 Agreement

The most recent collective-bargaining agreement became effective July 1, 2009, and remained in effect until July 1, 2012. (Jt. Exh. 4). The "Longevity Pay" provision of the 2009 Agreement in Article 44, which is at issue in this case, provided in relevant part:

> 44.1 Every December 1st and June 1st of each year of this Agreement, employees who have completed at least ten years of full-time service but less than 15 years of [full-time] service shall qualify for $100.00 for each year of continuous full-time service in excess of nine years.
>
> 44.2 Employees that have completed 15 or more years of full-time service shall receive $150.00 for

each year of continuous [full-time] service in excess of nine years, up to a semi-annual maximum of $3,000.00 and an annual maximum of $6,000.00.

44.3 Employees on industrial leave shall qualify for this payment for only the first six (6) months of industrial leave.

44.4 Payments will be made to employees who are active as of the date payment is made. Payments will be paid no longer than 30 days s after the qualifying date.

44.5 An employee must be in good standing as of the qualifying date to receive longevity pay. Good standing shall be defined as not currently on probation for prior actions, being in compliance with attendance and timeliness policies, and maintaining acceptable documentation performance during the prior six (6) month period.

(Jt. Exh. 4, p. 61 of 62).

3. Other relevant provisions of the 2009 Agreement[11]

Article 3, entitled "Duration of Agreement," Section 3.1 provided, in relevant part: "[t]his Agreement shall be considered effective July 1st, 2009 and shall remain in effect until July 1, 2012." The cover page of the 2009 Agreement contains the following: "Effective Dates: July 1st, 2009-July 1st, 2012." (Jt. Exh. 4, p. 6 of 62; p. 1 of 62).

Article 36—"Hourly Pay," Section 3.1 of this Agreement provided in relevant part:

> 36.1 Beginning with the first full pay period following the signing of this labor agreement, each active/current employee covered under this agreement will receive a 4% increase including retroactive pay for hours worked since July 1, 2009. This retro payment will be based on only hours worked in a position covered in this labor agreement.

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[11] Respondent cited to or referenced these other provisions to support its theories that the Union either agreed to a set number (six) of longevity payments during the specific term of the 2009-2012 Agreement, waiving its right to bargain, or waived its right to bargain by failing to file a grievance or unfair labor practices (ULP) charge when Respondent discontinued pay increases under Article 36 of the 2009 Agreement. These theories will be discussed in the Discussion and Analysis sections of this decision. (R. Br.).

> 36.2 Beginning with the first full pay period in July 2010, each employee covered under this agreement will receive a 2.5% increase.
>
> 36.3 Beginning with the first full pay period in July 2011, each employee covered under this agreement will receive a 3.5 % increase.

(Jt. Exh. 4, p. 53 of 62).

4. Expiration of 2009 Agreement and discontinuance of longevity pay

The 2009 Agreement expired on September 8, 2012. It initially expired on July 1, 2012, pursuant to the effective dates in the agreement, but the parties entered into three consecutive, temporary agreements to extend the 2009 Agreement through September 8, 2012. (Jt. Exh. 4, p. 6 and Jt. Exhs. 5-7). However, the parties began negotiations for a successor agreement in about March 2012, and in fact, continue to meet and negotiate for a new agreement. (Tr. 54-55, 92-93; GC Exh. 2). The parties agree to the most material facts following the expiration of the 2009 Agreement. They agree that Respondent made the last longevity payment to eligible unit employees in June 2012, and refused to continue to make these payments in December 2012 and thereafter. Respondent, through COO Ryals' testimony and stipulations, admits that it did not provide the Union with notice or an opportunity to bargain prior to the decision to discontinue longevity payments.[12] In fact, Ryals did not "believe there was

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[12] The parties also stipulated had Respondent issued longevity pay pursuant to the formula set forth in the 2009 Agreement, payment would have totaled $87,150 to 138 bargaining unit employees. (Jt. Exh. 8).

any need for [Respondent] to notify them" He asserted that "[t]he plain language of the CBA that was expired, there was no continuing process that I would notify them about." (Tr. 59-60; 166; Jt. Exh. 8).

Although questioned at length as to who made the decision to discontinue longevity pay, and with whom he discussed the decision, it is evident from Ryals' undisputed, unwavering testimony that he made the decision to terminate longevity pay after the 2009 Agreement expired, and that Respondent sanctioned this decision. (Tr. 56-60). Ryals did not, however, inform the Union of his decision until December 3, 2012, when Lizardi contacted Respondent's Payroll Manager, Cassandra Collins[13] via email, to ask if the "longevity checks would be in the next check or the one after[.]" Collins initially responded "'"[t]he one after," but 13 minutes later, emailed the following: "Sorry, but from what I understand we won't be paying any longevity yet." She then clarified that "the company is not planning on paying longevity" Lizardi forwarded these emails to the Union Treasurer, Kevin Burkhart. (GC Exh. 4). (GC, Exh. 4). Kevin Burkhart subsequently asked Ryals "to do the right thing,"[14] and issue the longevity pay, but Ryals denied the request. (Tr. 57, 60; Jt. Exh. 8).

I credit Lizardi's undisputed testimony that he and one or more of his other Union officials contacted Respondent

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[13] Collins normally administered the actual payments as directed by Respondent. She did not make decisions as to whether or not payments would be issued. (Tr. 73-77).

[14] Ryals did not specifically recall this conversation with Burkhart, but admitted that "Kevin says things like that, it wouldn't be out of character for him." (Tr. 60).

almost immediately after he received word from Collins that the longevity benefit would not be paid. They inquired as to the reason why it was not paid. As previously stated, Respondent admits that it refused to honor this request or give the Union an opportunity to bargain over its decision not to make longevity payments.

Ryals recalled that he verbally communicated his decision to stop longevity pay to his managers and other company executives, and that no one disagreed. (Tr. 57, 139-140). The only email produced regarding written communication to other managers/officials was dated September 11, 2012, and entitled "Local I-60 Negotiations Update." While it confirmed that the parties were still working together to negotiate a new agreement after the 2009 contract expired, it did not mention longevity pay, or other specific provisions in the 2009 Agreement. It did state in pertinent part:

Managers:

> By now you have all heard that the contract with Local I-60 has expired and the company did not extend the contract. This is true. . . .
>
> . . we agreed to begin negotiations in March, well before the June expiration date of the existing contract .
>
> Much to the Company's surprise, during our first negotiation session on March 27th, the Union announced that they wanted to completely scrap all articles in the existing contract, which took literally hundreds of hours to negotiate over the years, and start over. . . .
>
> The Company has negotiated in good faith and, as such, extended the existing contract twice. The

> Company did not feel that continued extension of the contract would result in any improvements in the negotiations process. Thus, the Company declined to take such action. Obviously the process is taking longer than anyone wants, but a lot of progress has been made. We are optimistic that we will be able to reach Agreement in a timely manner on the remaining outstanding articles.
>
> Now what does this all mean to you and how you manage your direct reports? The answer is, pretty much nothing.
>
> Wages benefits and working conditions remain unchanged. The disciplinary process remains unchanged. The disciplinary process remains unchanged at your level. All policies, procedures, and standard operating procedures remain unchanged.
>
> In other words, it is business as usual . .
>
> While there are a few changes that the Law allows, like the ability of the Union to Strike and the ability of the Company to Lock Out the workforce, no one is even contemplating strikes or lockouts that I am aware of. Again, your responsibility is to perform business as usual.[15]

(GC Exh. 2; Tr. 150-151).

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[15] It appears from this correspondence to managers, that Ryals may not have made his decision to discontinue longevity payments as of September 11, 2012 (3 days after the expiration of the Agreement). His testimony indicates that he probably made his decision in November 2012 or before the time that longevity pay historically being paid out to someone. (Tr. 57).

In August 2012, prior to the expiration of the 2009 Agreement, the parties reached a tentative agreement (TA)[16] to retain a longevity pay provision in the new or successor agreement that would remain identical to the Article 44 of the 2009 Agreement. (Tr. 55-56; 95-97).

Ryals testified that he drafted the longevity language in the collective-bargaining agreements from 2001 through 2009. (Tr. 123, 124). He explained that his understanding of what Respondent committed to in Article 44 of the 2009 Agreement was that "longevity pay would be paid out on the two dates specified, which were. . . . July and December of each year that the agreement [went] into effect. When the agreement was no longer in effect, the company had no obligation, and nor would [he] believe the plain language indicates that payment [would continue]." He asserted that the Company believed it was agreeing to only "a total of six payouts for longevity," and those were the only payments made throughout the course of the 2009-2012 Agreement. (Tr. 165-166). Clearly, the Union has a different understanding as to what would occur after the expiration of the 2009 Agreement. I find that this is a legal dispute rather than a factual one, and that the 2009 Agreement was silent as to what would happen to the longevity provision in the event it expired. Respondent refused to stipulate that the parties had not discussed with each other their postexpiration expectations for the 2009 Agreement, either during negotiating sessions or otherwise, leading up to the 2009 contract.

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[16] Both Ryals and Lizardi explained that a TA occurs when both negotiating parties to a new or successor agreement agree to the language of a particular provision, pending approval of a final collective-bargaining agreement. (Tr. 55-56; 95-97).

However, it is uncontested that neither Lizardi nor Ryals could recall any discussions among the parties' negotiating team members regarding what would happen to the biannual longevity payments if the 2009 Agreement expired without a successor agreement in place.[17] (Tr. 109-110, 170). Thus, I find the parties did not discuss or come to an agreement, nor include in any agreement, what would occur to longevity pay once the 2009 Agreement expired.

DISCUSSION AND ANALYSIS

Legal Standards

1. Threshold issue is whether a determination of the merits should be deferred to a Grievance and Arbitration Process?

I will first address Respondent's assertion that it may be appropriate to defer my decision in this case to an arbitrator pursuant to the 2009 Agreement's Grievance and Arbitration Procedures. Respondent relies on the holding in *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430

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[17] There was a lot of trial discussion as to whether or not Ryals or Tuesday Kramer took and kept bargaining session notes regarding longevity pay discussions. Ryals asserted that he nor Kramer had any such notes. On the other hand, Lizardi observed that in most meetings, Kramer appeared to be taking notes on her laptop, but he could not recall if she took notes during longevity pay discussions. (Tr. 94-95). I tend to credit Lizardi's observations over Ryals' rather unequivocal, vague testimony that "[s]he's been there, she takes notes some of the time [s]ome of the time, she does not." (Tr. 48). Since Kramer was not called by either party to settle this dispute, and neither Ryals nor Lizardi could recall specific discussions about longevity pay, other than in sessions for the new contract, this matter is not relevant or critical to the decision in this case.

U.S. 243 (1977). (Tr. 22; GC Exh. 1(e); Jt. Exh. 4, pp. 37-41;)[18] Respondent asserted, at the trial and in its answer, that if the Agency alleges that it violated the collective-bargaining agreement, then any right that arises under the contract is arbitral, regardless of whether the contract has expired. (Tr. 22). As the Agency pointed out in its Brief,[19] the Board has long recognized the appropriateness of deferring certain unfair labor practice charges in cases where a union and employer have active grievance and arbitration procedures in place. *See In Re Univ. Moving & Storage Co.*, 350 NLRB 6, 20 (2007), citing *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984) (the Board reaffirmed and bolstered its doctrine in *Collyer Insulated Wire*, supra).

Under *Collyer Insulated Wire*, supra, and *United Technologies Corp*, supra at 558, deferral is appropriate when:

> . . . the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity [or 'enmity'] to the employees' exercise of protected rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve

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[18] In its answer, and at trial, Respondent asserted this deferral argument as an affirmative defense, but did not address it in its Brief. (R. Br.). However, since Respondent has not officially abandoned this affirmative defense, it is appropriate to address it as a threshold issue before deciding the merits of the unfair labor practice issue.

[19] R. Br. pp. 11-12.

> the dispute; and the dispute is eminently well suited to such resolution [by arbitration].

Univ. Moving & Storage Co., 350 NLRB 6, 20 (2007). In the instant case, the parties had a long and productive collective-bargaining relationship, with no claim of employer animosity, as evidenced by the successive agreements and on-going negotiating towards a new agreement. However, this case does not pass the *Collyer Insulated Wire* test, in that the 2009 Agreement does not encompass the dispute at issue. In fact, as discussed further here, the 2009 Agreement specifically stated that the arbitration clause would not survive the Agreement

In *Nolde Bros., Inc. v. Bakery Workers Local 358*, 430 U.S. 243 (1977), the Supreme Court held that when the parties have agreed to arbitrate grievances arising under a collectivebargaining contract, that obligation is presumed to continue once the contract has expired. In a subsequent case, the Supreme Court clarified its holding in *Nolde, Bros., Inc.*, supra, stating that "*Nolde Brothers, supra*, 430 U.S. at 255 ... found a presumption in favor of postexpiration arbitration of disputes unless negated expressly or by clear implication so long as such disputes arose out of the relation governed by the contract." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 191-192 (1991).

The facts in *Nolde Brothers* are easily distinguished from this case. First, the case involved a suit to compel arbitration under the arbitration provisions of an expired collective-bargaining agreement, which, unlike the arbitration in the instant case, was silent regarding postexpiration grievances or arbitration. The union alleged the employer was obligated to arbitrate its refusal to pro-

vide severance pay, under the expired agreement, to displaced employees who had worked for the company for at least 3 years. The employer argued that its obligation to arbitrate (and pay the displaced employees) died with the contract because the event leading to displacement and giving rise to the dispute—the closing of the plant—occurred after the expiration of the contract. The Court held that "[t]he dispute . . . although arising after the expiration of the collective-bargaining contract, clearly arises under that contract." *Nolde*, supra at 249. The Court observed that parties had agreed in the expired contract's arbitration clause to attempt to resolve "all grievances," but that the contract was silent as to post-expiration grievances. It held that " . . in the absence of some contrary indication, there are strong reasons to conclude the parties did not intend their arbitration duties to terminate automatically with the contract." *Nolde Brothers* at 253. The Court concluded "[i]n short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." *Nolde Brothers*, supra at 255.

In *S & W Motor Lines*, 236 NLRB 938 (1978), the Board adopted the position that the arbitration provision did not survive contract expiration because the *Nolde* presumption favoring arbitrability of postexpiration disputes had been negated by express language in the contract. Unlike the contract in *Nolde*, but like the contract in *S & W Motor Lines*, supra, the expired 2009 Agreement in this case explicitly states that the parties' grievance and arbitration procedure "does not survive the term of this

Agreement." (Jt. Exh. 4, p. 37).[20] Therefore, I find no basis upon which to defer the merits of this case to arbitration where the parties clearly decided that arbitration would not survive the contract. Furthermore, the parties to this expired 2009 Agreement "have no contractual obligation to adhere to the agreement's arbitration procedure in processing grievances arising after the agreement's arbitration date." See *W. H. Froh, Inc.*, 310 NLRB 384, 386 (1993), citing *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 57 (1987) and *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970).[21]

2. Discontinuance of longevity pay after expiration of the 2009 Agreement

Mandatory subject of bargaining

First, I find that longevity pay, as described in Article 44 of the 2009 Agreement, as well as the three predecessor agreements, is clearly a mandatory subject of bargaining.[22] The Board has recognized longevity pay as a

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[20] The Board has consistently recognized that the parties generally do not have an obligation to adhere to the terms of an expired arbitration agreement. See *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 57 (1987) (the Board reaffirmed its view that "the arbitration commitment arises solely from mutual consent. Congress did not intend the [NLRA] to create a statutory duty to arbitrate," and recognized deferral of charge to be inappropriate where grievances were triggered by events occurring after the expiration of contacts.").

[21] The Board in *W. H. Froh, Inc.*, supra at 386, fn.5, noted that *Hilton-Davis* has been cited with approval by the Supreme Court in *Litton Fin. Printing Div. v. NLRB.*, 501 U.S. 190 (1991).

[22] While Respondent does not assert that longevity pay is not a mandatory subject of bargaining, at trial, it insisted on characterizing longevity pay as a "longevity bonus" or "bonus," rather than

mandatory subject of bargaining. In *Pine Brook Care Ctr., Inc.*, 322 NLRB 740, 748 (1996), the Board adopted the Administrative Law Judge's findings which including a finding that certain benefits, including "longevity pay," constituted terms and conditions of employment which were "clearly" mandatory subjects of bargaining. Additionally, whether described as a "longevity bonus" of "longevity pay," I find Article 44 describes a payment to eligible senior employees which constitutes a mandatory subject of bargaining.

Unilateral change violation

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees;" and has culminated into a longstanding rule that an employer violates Section 8(a)(5) if it "unilateral[ly] change[s] conditions of employment under negotiation . . . , for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Furthermore, it is well settled that the unilateral change doctrine set forth in *NLRB v. Katz*, supra, whereby an employer violates the NLRA if it effects a unilateral change of an existing term or condition of employment, without bargaining to impasse, extends to cases in which an existing agreement

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agreeing that it is the same as "longevity pay." However, as I found earlier in this decision, Article 44, drafted by Ryals, and approved by the Union, is entitled "Longevity Pay," and both parties have certainly referred to benefit as a "bonus" or "pay" interchangeably throughout these proceedings. Nevertheless, no matter what they call it, it is clearly an economic benefit flowing from the relationship between the employer and unit employees, and a mandatory subject of bargaining as discussed here.

has expired and negotiations on a new one are pending. See, *e.g.*, *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544, n.6 (1988), *Litton Fin. Printing Div. v. NLRB.*, 501 U.S. 190, 191-192 (1991). Therefore, an employer's duty to maintain the status quo remains the same, during negotiations, when both the Union and employer have agreed to a particular term or condition of employment in a collective-bargaining agreement which has expired. *The Finley Hospital*, 359 NLRB No. 9 (2012) at 2, citing *Litton*, supra at 198; *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra.

An employer may escape liability for a unilateral change violation if it proves that a union has expressed or implied a "clear and unmistakable waiver" of its right to bargain. *American Broadcasting Co.*, 290 NLRB 86, 88 (1988); *California Pacific Medical Center*, 337 NLRB 910 (2002).

The Board has relied upon several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman*, 295 NLRB 180, 184-187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992). The party asserting the waiver, however, bears the burden of establishing the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

Respondent, from the offset, does not raise the customary defense that the Union waived its right to bargain. Rather, Respondent asserts that the waiver doctrine is irrelevant in this case because it never changed existing terms and conditions of employment. In fact, Respond-

ent even argues that "longevity bonuses" were not an ongoing practice, "but were limited by both parties in the 2009 Agreement to a fixed number of payments (six) on specified dates which "'expired of [their] own accord" once they were made.[21] Respondent contends that this calculated expiration did not constitute a "change," nor create an obligation to bargain, because Respondent made all longevity payments required by the expired 2009 Agreement. Respondent does argue, alternatively, that if I apply the "clear and unmistakable waiver" doctrine, Respondent's obligation would be satisfied much for the same reasons, i.e., that it met its obligation once the sixth payment was made. Respondent also avers, alternatively, that the Union implicitly waived its right to bargain when it failed to grieve or file a charge in connection to Respondent's termination of wage increases under Article 36 of the 2009 Agreement. It relies heavily its interpretation of Union President Adam Lizardi's testimony. (R Brief).

First, I have considered all of Respondent's arguments as to why its actions did not constitute a "change" or "unilateral change," and find they are unsupported by the case law and merits. Pursuant to *Katz*, supra, and its progeny cited here, Respondent effected a unilateral

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[21] Respondent made the last longevity payment in June 2009, prior to the expiration date of the longevity agreement. I must reject, however, this questionable assertion that longevity payments were not an ongoing practice. This belies the undisputed evidence that Respondent and the Union have in fact continued the practice of including longevity pay provisions in its collective-bargaining agreements since 2001. Furthermore, there is no language in the 2009 Agreement to even infer that issuance of biannual longevity payments was a one-time or occasional practice.

change of an existing term or condition of employment, without bargaining to impasse. This rule, as set forth above, has been extended to cases such as the instant case, in which an existing agreement has expired and negotiations on a new one are pending. See, *e.g.*, *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, supra at 544, n.6 (1988); *Litton Fin. Printing Div. v. NLRB*, supra at 191-192. There is simply no dispute in this case that Respondent changed a term and condition of employment pending negotiations for a new contract.

Next, I find there is clearly no express waiver encompassed in the 2009 Agreement, and reject Respondent's assertion that the language in the Longevity Pay Article 44, i.e., "Every December 1st and June 1st of each year of this Agreement . . . ," coupled with effective dates of the contract, represents the Union's express or implied waiver, much less a "clear and unmistakable" waiver of its bargaining rights. The Board rejected similar language in *Finley Hospital*, supra at 1, in which it found the respondent violated Section 8(a)(5) of the Act by unilaterally discontinuing the annual 3-percent pay raises provided in the parties collective-bargaining agreement upon expiration of the agreement. The Board applied the "clear and unmistakable waiver" standard in that case, requiring parties to "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Finley Hospital*, supra at 2, citing *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-812 (2007).

The respondent in *Finley Hospital*, as in this case, relied on the multiple references, in the collective-bargaining agreement provision at issue, to the term of the agreement, i.e., "During Term of the Agreement," "For the duration of this Agreement," and "during the term of this Agreement." The Board found that while such references might limit the contractual obligation and right for any period after the contract expiration, "these references fail to "unequivocally and specifically express [the parties'] mutual intention to permit unilateral employer action with respect to the [annual wage increases]." The Board recognized that neither the wage increase provision, nor the agreement as a whole, provided for any postexpiration action or conduct, "" . . . much less expressly permit[ted] unilateral employer action" upon the expiration of the agreement. *Finley Hospital*,, supra at 3, citing *Provena*, supra at 811.

Prior to Finley Hospital, the Board consistently reached this same result its cases involving postexpiration changes in terms and conditions established by an expired agreement. See *AlliedSignal Aerospace*, 330 NLRB 1216, 1216-1222 (2000), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) ("[w]hatever the scope of the [r]espondent's obligation as a matter of contract, there is no basis for finding the [u]nion waived its [statutory] right to continuance of the status quo as to terms and conditions . . . after contract expiration); *General Tire & Rubber Co.*, 274 NLRB 591, 592-593 (1985), enfd. 795 F.2d 585 (6th Cir. 1986) (Board found the contract did not address employer's statutory obligation to pay benefits postexpiration of a contractual benefit continuation period, and therefore did not constitute a waiver of the union's rights). The Board in this

case distinguished *Finley Hospital* from Board decisions which found a "clear and unmistakable," because the contracts in those cases included postexpiration language. See *Cauthorne Trucking*, 256 NLRB 721 (1981), granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982); *Oak Harbor Freight Lines*, 358 NLRB No. 41 (2012).

The contract language in the instant case, like that in *Finley Hospital*,[24] and the other Board cases cited there, *AlliedSignal* and *General Tire*, sets limits on the effective periods of the contractual obligation, but fails to provide for the employer's postexpiration conduct or obligation or authorize unilateral changes by the employer. Respondent contends *Finley Hospital* is factually apposite from this case because the longevity payments provided in this case's 2009 Agreement were "separate, stand-alone [events] timed to occur on specific dates, and were not ongoing [practice] like the wage increases in *Finley Hospital*." This argument is completely unsupported by the evidence, as discussed earlier. The longevity payments in the instant case were not "stand-alone" or "separate" events. Rather, they were consistent payments issued biannually in several successive agreements

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[24] I have considered, and dismiss, Respondent's argument that Finley Hospital should not be considered by me because it was decided by an improperly constituted Board, citing *Noel Canning v. NLRB*, supra, and *New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013). As decided earlier on in this decision, I find this argument is without merit, as the Board is not bound by these decisions. It has rejected this argument, as the issue regarding the validity of recess appointments is pending litigation and ""definitive resolution." I note, as well, that the Board in Finley did not make decisions of first impression, but relied on well-settled Board and Court decisions.

between Respondent and the Union from 2001 through 2012. In fact, while not at issue here, the parties admitted they agreed to a tentative agreement (TA) to continue to maintain the longevity payments in a successor agreement. Therefore, I find the employer in this case has not shown a clear and unmistakable waiver, of any kind, of its obligation to maintain the status quo created in the expired 2009 Agreement, and has therefore violated Section 8(a)(5) and (1) of the Act.

Respondent also argues that *Finley Hospital* is based on reasoning that has been rejected by the D.C. Circuit, and therefore should not be treated as binding or persuasive "in any sense." See *NLRB v. USPS*, 8 F.3d 832, 838 (D.C. Cir. 1993); *Enloe Medical Ctr. v. NLRB*, 433 F.3d 834, 837 (D.C. Cir. 2005). (R Br., p. 7, fn.2). The D.C. Circuit Court of Appeals rejected the Board's "clear and unmistakable" waiver doctrine in those cases, implementing instead, its own "waiver" vs. "covered by" doctrine.[25] While the Board is not bound by the findings in these cases, as evidenced in its findings in *Finley Hospital*, I find that even applying the D.C. Court of Appeals doctrine here, Respondent's argument is without merit, and my decision ecision remains the same. The Court of Ap-

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[25] Held that "questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement," citing *NLRB v. USPS*, supra at 836-837. Instead, the proper inquiry is ""simply whether the subject that is the focus of the dispute is 'covered by' the agreement." Id at 836. Also see *Dept. of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992). Unlike the subject matter in dispute in the D.C. Circuit Court of Appeals cases cited here, I find termination of longevity pay and the refusal to bargain over the same was not "covered by" the 2009 Agreement.

peals found in both cases that the companies' actions, including implementation of changes and refusal to bargain over the effects of those changes, were sanctioned by agreed-upon, existing collective-bargaining agreements. See *NLRB v. USPS*, supra at 834, 837; *Enloe Medical Ctr.*, supra at 837. The instant case is distinguishable in that the 2009 Agreement was not an existing agreement, and the 2009 Agreement's Management Rights clause or other provisions did not so authorize or "sanction" Respondent to discontinue longevity pay, and refuse to bargain. (Jt. Exh. 4, pp. 8-9 of 62). Thus, the D.C. Circuit Court's waiver approach is not inapposite to this case, and I still find the Union in the instant case did not waive its bargaining rights.

Likewise, I reject the notion that the Union implicitly waived its right to bargain over the termination of longevity pay because it did not challenge, but rather, accepted limitations on hourly wage increases in Article 36 of the agreement. Article 36 of the 2009 Agreement provides for annual percentage increases in hourly pay beginning with the first full pay period following the signing of the agreement, and thereafter, beginning with the first full pay period in July 2010 and July 2011, for each "active/current employee covered under this agreement." Lizardi acknowledged that the Union did not take issue with this provision since it set forth specific dates and years for the increases and termination thereof. I agree, and so find, that the language in this provision is distinguishable from Article 44, in that it specifically terminated hourly wage increases 1 year before the contract ended. Notwithstanding my finding, the Board has rejected "waiver-by-inaction defense, finding the Union must have clear notice of the employer's intent to insti-

tute a change. *Rappazzo Elec. Co.*, 281 NLRB 471, 482 (1986).

I therefore conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing longevity pay without first having afforded the Union notice and an opportunity to bargain. I further conclude that Respondent violated Section 8(a)(1) of the Act by notifying the Union, after the fact, of its decision that it would not be issuing longevity pay.

CONCLUSIONS OF LAW

1. SW General, Inc. d/b/a Southwest Ambulance (the Company) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act and is the recognized collective-bargaining representative of a bargaining unit composed of the production, maintenance, clerical, technical, and office employees employed by the Company at its facility in Mesa, Arizona.

3. On or about December 1, 2012, and thereafter, the Company violated Section 8(a)(5) of the Act by failing to give notice and an opportunity to bargain with the Union prior to unilaterally terminating longevity payments for all eligible unit employees after the most recent expiration of the 2009 collective-bargaining agreement on September 8, 2012.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist from such conduct and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully and unilaterally terminated longevity payments, and failed to distribute them to eligible unit employees as required by the parties' July 1, 2009 through July 1, 2012 contract, as extended to September 8, 2012, I shall order it to make whole for any loss of earnings or benefits suffered as a result of said unilateral change. Backpay shall be computed in accordance with *F W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate the affected employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award award(s) covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No.44 (2012).

On these findings of fact and conclusions of law, and on the entire record here, I issue the following recommended[26]

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[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Company, SW General, Inc. d/b/a Southwest Ambulance, in Mesa, Arizona, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Unilaterally terminating unit employees' longevity pay benefits without first notifying the Union and affording it an opportunity to bargain concerning such change and its effects.

(b) In any like or related manner interfering with, restraining, or coercing Employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind the unilateral material change to longevity pay implemented in December 2012, as it relates to discontinuing longevity payments every June 1st and December 1st of every year and maintain those terms, as set forth in the most recent collective-bargaining agreement between Respondent and the Union effective from July 1, 2009 through July 1, 2012, and extended by further agreements until September 8, 2012, and maintain those terms in effect until the parties have bargained and agreed to material changes and/or until the parties have agreed upon and implemented a new collective-bargaining agreement, or until Respondent has bargained to a good-faith impasse with the Union regarding longevity pay.

(b) Make any unit employees and former unit employees whole by reimbursing them for longevity pay, with interest as prescribed in *New Horizons for the Retarded*, 283

NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), for any loss of benefits suffered as a result of the unilateral implemented changes to longevity pay.

(c) Within 14 days after service by the Region, post at its Mesa, Arizona facility, and Respondent's Southwest Emergency Medical Services Group's facilities, if any, in Maricopa, Pinal, Pima and Graham Counties, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 1, 2012.

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[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated at Washington, D.C. Aug. 8, 2013

Donna N. Dawson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

*1 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement material, substantial, and significant changes to our employees' longevity pay without providing the Union notice and an opportunity to bargain.

WE WILL rescind the unilateral material change to discontinue longevity pay implemented in December 2012, as it relates to elimination of biannual longevity pay to eligible unit employees consistent with Article 44 of the collective-bargaining agreement, effective from July 1, 2009 through July 1, 2012 and extended through September 8, 2012 for all affected bargaining unit employees and former unit employees.

WE WILL, if requested by the Union, bargain in good faith over any material change in the eligibility of employees or former employees with 10 or more years of full

time service with Respondent as of December 1, 2012 and thereafter, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole, with interest, any current or former unit employee affected by the termination of longevity pay as of December 1, 2012, and thereafter, for any loss of earnings and other benefits suffered as a result of the unlawful unilateral change made to longevity pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

SW GENERAL, INC. D/B/A SOUTHWEST AMBULANCE

(Employer)

Dated: _____ **By:** .....

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Resident Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Suite 300N, Oakland, CA 94612-5224

510-637-3300 Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 510-637-3253

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2015
NLRB-28CA094176

No. 14-1107
Consolidated with 14-1121

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Filed on Jan. 20, 2016

ORDER

BEFORE: HENDERSON, SRINIVASAN, and WILKINS, Circuit Judges

Upon consideration of respondent's petition for panel rehearing filed on October 5, 2015, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
KEN R. MEADOWS
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2015
NLRB-28CA094176

No. 14-1107
Consolidated with 14-1121

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Filed on Jan. 20, 2016

ORDER

BEFORE: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN*, GRIFFITH, KAVANAUGH*, SRINIVASAN, MILLETT*, PILLARD**, and WILKINS, Circuit Judges

The National Labor Relations Board's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter a majority of the judges eligible to participate did

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* Circuit Judges Brown, Kavanaugh, and Millett would grant the petition.

** Circuit Judge Pillard did not participate in this matter.

not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ _____
KEN R. MEADOWS
Deputy Clerk

APPENDIX F

5 U.S.C. 3345 provides:

Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or em-

ployee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.